Supreme Court, U.S.
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No. 05-051286

In The

Supreme Court of the United States

THE STATE OF OKLAHOMA,

Petitioner,

v.

DARRIN LYNN PICKENS, MAXIMO LEE SALAZAR, and ROBERT WAYNE LAMBERT,

Respondents.

On Petition For A Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Atkins v. Virginia* demands an appellate court to substitute its judgment for the verdict of a jury rejecting a capital defendant's claim that he is mentally retarded when the court finds "any evidence" in the record of an IQ score of 70 or below and two adaptive functioning deficits even though there is competent, credible evidence supporting the finding of the jury.

LIST OF PARTIES

All parties to this action are listed in the caption.

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JURISDICTION

The Oklahoma Court of Criminal Appeals ("OCCA") issued these decisions on December 7, 2005. An extension of thirty (30) days to file this petition was granted on February 27, 2006, in Case No. 05A793. This petition is timely pursuant to this Court's Rule 13.2.

Pursuant to this Court's Rule 12.4, the State of Oklahoma files this joint petition for a writ of certiorari to the OCCA.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 to review on writ of certiorari the judgments of a state court of last resort for criminal matters.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASES

Darrin Lynn Pickens: In the early morning hours of February 4, 1990, Darrin Lynn Pickens drove by the Mr. Quik Convenience Store in Sapulpa, Oklahoma, to confirm the clerk was alone. Pickens had robbed convenience stores before, including this one (Court's Exh. 1, p. 8 [from Pickens' 1998 trial]), but having let the clerks live, he had been convicted and sent to prison. During the robbery, he shot and killed Tommy Lee Hayes. Four days later, Pickens robbed a convenience store in Tulsa, Oklahoma, and fatally shot the clerk. The next morning, Pickens robbed another one in Tulsa. His gun failed to fire and the clerk struggled with him before Pickens escaped. Police responded to the call and, after Pickens wrecked his car during pursuit, the police recovered Pickens' gun. *Pickens v. State*, 19 P.3d 866, 872 (Okla. Crim. App. 2001).

For his homicide of Tommy Lee Hayes, Pickens was convicted of one count of First Degree Felony Murder in Creek County, State of Oklahoma, District Court Case No. CRF-1990-66. Upon retrial for the murder charge, the jury found three statutory aggravating circumstances beyond a reasonable doubt, namely: (1) that Pickens had previously been convicted of a felony involving the use or threat of violence against the person; (2) that Pickens committed the murder for purpose of avoiding or preventing lawful arrest or prosecution; and (3) that there existed the probability that Pickens would commit criminal acts of violence in the future that would constitute a continuing threat to society. The OCCA affirmed Pickens' conviction and sentence for the murder. *Pickens v. State*, 19 P.3d 866 (Okla. Crim. App. 2001), *cert. den'd*, 536 U.S. 961 (2002).

In a second application for post-conviction relief, Pickens claimed that he was mentally retarded and that his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). *Murphy* implemented *Atkins* in the absence of any statutory authority by the state legislature. The OCCA remanded the case for a jury trial to determine whether Pickens was mentally retarded. On February 17, 2004, a jury was impaneled and, after hearing evidence over four days, returned a verdict that Pickens was not mentally retarded.

During the remanded proceedings, Pickens refused to submit to any testing regarding his current IQ or adaptive functioning, either by his own expert or by the State's expert, resulting in the lack of any standardized adaptive functioning test results. (Pickens *Atkins* Tr. 512). Even Pickens' expert stated that lack of this testing made it harder to determine Pickens' current functioning (Pickens *Atkins* Tr. 454).[1] With the exception of one IQ test at 70 (in 1980), all standardized testing of Pickens' intelligence quotient excluded him from classification as mentally retarded. He obtained a score of 71 at age 7; the examiner noted in the report, however, that the test was slanted to the white student and that Pickens "very possibly could do much better on a test slanted to the Black student." (Deft's Exh. 17; Pickens *Atkins* Tr. 477). He scored a 79 in 1975. (Deft's Exh. 18; Pickens *Atkins* Tr. 621). In 1990, after Pickens was convicted for murder, he was tested by the

[1] Lack of any current testing was telling in light of Pickens' expert testifying: "As I interacted with him, I didn't think he was the sharpest pencil in the drawer, but I did not leave thinking he was mentally retarded from that interview." (Pickens *Atkins* Tr. 522).

Oklahoma Department of Corrections and obtained a score of 77 or 76, depending on who scored the test. (Pickens *Atkins* Tr. 435-36, 580-81)

Evidence of Pickens' adaptive functioning at the time of the trial included the fact that apart from having to use shorter words, communication with him was not a problem (Pickens *Atkins* Tr. 332-33). He was able to write letters and submit written requests for medical assistance while in prison (Pickens *Atkins* Tr. 451-52).

Pickens related to defense expert, Dr. Mark Cunningham, that he had washed dishes during lunch recess while in school, had cut grass and cleaned parks for the city, stacked food items, and even operated a forklift in a warehouse unloading trucks (Pickens *Atkins* Tr. 502).

Despite evidence in the record supporting the verdict of the jury, the OCCA reversed the verdict, finding Pickens met his burden of proving, by a preponderance of the evidence, that he is mentally retarded, and modified his sentence of death to life without parole. App. 21.

Maximo Lee Salazar: In the early morning hours of August 24, 1987, nine (9) year old Jennifer Prill awoke in her Cache, Oklahoma, home to discover Maximo Lee Salazar burglarizing the residence. Salazar directed her to return to her bedroom. He then stabbed her twice in the throat as she lay on her bed. He covered her body and fled the scene with a small amount of cash and the keys to the Prill family vehicle. Five days later, a burglar alarm sounded at a convenience store in Lawton, Oklahoma. The responding officer observed Salazar's car drive from the scene. After a high speed chase, the occupants abandoned the car. In the car were a bloody knife, the Prill's car keys, and a gun stolen during the burglary of another residence.

Salazar later confessed to police his burglary of the Prill residence and the murder of Jennifer Prill. *Salazar v. State*, 852 P.2d 729, 731-32 (Okla. Crim. App. 1993).

Salazar was convicted of First Degree Malice Aforethought Murder and Burglary in the First Degree in Comanche County District Court Case No. CRF-87-460. The jury found three aggravating circumstances, namely: (1) that Salazar knowingly created a great risk of death to more than one person; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence of a probability that Salazar would commit criminal acts of violence that would constitute a continuing threat to society. *Salazar v. State*, 852 P.2d 729 (Okla. Crim. App. 1993). On re-sentencing, the jury found one aggravating circumstance, that Salazar knowingly created a great risk of death to more than one person. *Salazar v. State*, 919 P.2d 1120 (Okla. Crim. App. 1996). Remanded for re-sentencing a second time, a jury found two aggravating circumstances – that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution and that there existed the probability that Salazar would commit criminal acts of violence that would constitute a continuing threat to society – and again imposed a sentence of death. *Salazar v. State*, 973 P.2d 315 (Okla. Crim. App. 1998).

Salazar thereafter filed a second application for post-conviction relief which included a claim of mental retardation. Upon remand to the district court for a jury determination, after a four-day trial, the jury concluded Salazar was not mentally retarded. Evidence indicated he had IQ tests scoring as high as 83. (Salazar *Atkins* Tr., State's Exh. 16). There was also evidence that Salazar had malingered during testing by the State's expert. *Id.*, State's Exh.

15. Evidence refuted Salazar's claims of significant deficits in certain areas of adaptive functioning.

The OCCA found counsel provided ineffective assistance which resulted in its loss of confidence in the jury's verdict. It was also concerned with the testimony of the State's expert. Rather than remand for another jury trial on the issue of mental retardation, however, the court modified the sentence of life imprisonment without the possibility of parole. App. 58-59.

Robert Wayne Lambert: On October 6, 1987, Robert Wayne Lambert and his juvenile co-defendant robbed, kidnapped and murdered Laura Lee Sanders and Michael Houghton. They locked the victims in the trunk of the car. Lambert cut the gas line and the car was set on fire. The victims died of asphyxiation and thermal burns. *Lambert v. State*, 984 P.2d 221, 226 (Okla. Crim. App. 1999). Lambert was convicted of two counts of Murder in the First Degree in Creek County District Court Case No. CRF-87-240. *Lambert v. State*, 984 P.2d 221 (Okla. Crim. App. 1999), *cert. den'd*, 528 U.S. 1087 (2000). The jury found the existence of three aggravating circumstances as to each count in Lambert's case: (1) Lambert created a great risk of death to more than one person; (2) the murders were especially heinous, atrocious, or cruel; and (3) there existed a probability that Lambert would commit further criminal acts of violence that would constitute a continuing threat to society.

Pending resolution of a petition for a writ of habeas corpus in the Northern District of Oklahoma, Lambert filed a second application for state post-conviction relief raising the issue of mental retardation and second stage jury instructions. The OCCA remanded the case for a jury

trial on the issue of whether Lambert was mentally retarded and therefore ineligible for execution under *Atkins v. Virginia*.

After a trial spanning twelve days, Lambert was found not mentally retarded by a jury. On appeal, however, the OCCA rejected the jury's verdict based on its own conclusions that the weight of the evidence showed Lambert had met his burden of demonstrating that it was more probable than not that he met the three prongs of the test set forth in *Murphy v. State*, *supra*.

Prior to age 18, Lambert had two IQ scores, one of 68 and one of 77. App. 110. Later testing resulted in scores from 58 to 69. App. 111. When Dr. Call examined Lambert for his mental retardation trial, he found Lambert was malingering which led to an opinion that the IQ score of 66 he obtained from Lambert was not valid. App. 116. There was also evidence of malingering when he was in the county jail and at Eastern State Hospital. App. 116. In light of evidence of excessive absenteeism from school, and evidence that when he did attend school, Lambert was often sleepy, hungry, dirty, and unprepared, the jury could conclude deficiencies in his intelligence were not based on lack of intellectual capacity. App. 110.

Lambert was able to understand and manipulate his environment at prior jury proceedings. Two newspaper reporters testified about the games Lambert played with the jury at his competency trial. Lambert laid his head on the table or sat in a fixed, unanimated position staring ahead when the jury was present. When the jury was excused, Lambert talked and smiled with his family and counsel. When the reporters attempted to photograph this

behavior, Lambert saw them and reverted to his emotionless, fixed stare. App. 118.

The jury also heard State's Exhibit 30, a recording of Lambert's phone call from the jail to his sister during his mental retardation trial. He cautioned her not to discuss his case because the call might be recorded. When she persisted, he skillfully changed the subject. He further directed her to make certain phone calls to help his cell mate get a transfer to a different county. The trial court noted that his conversation was clear, spontaneous, thoughtful, and appropriate. App. 118-19.

The OCCA ignored the IQ score of 77 that disqualified Lambert for a diagnosis of mental retardation. App. 79. It also disregarded any requirement that Lambert show significant limitations in his adaptive functioning was connected to significantly subaverage intellectual functioning. *Id.* The court reversed the verdict of the jury and modified Lambert's sentence to life imprisonment without parole. App. 100.

SUMMARY OF THE ARGUMENT

The Oklahoma Legislature has not enacted statutes prohibiting the execution of mentally retarded murderers since this Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* found a national consensus against execution of mentally retarded criminal offenders in the adoption by 18 states of statutes proscribing execution of the mentally retarded. *Atkins* did not quote from any of the statutes, however, in footnote 3, the Court quoted as representative of the consensus the definitions of mental retardation set out by the American Association on Mental

Retardation ("AAMR") in MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (9th ed. 1992) ("MR-CDSS [9th ed.]"),[2] and the American Psychiatric Association ("APA") in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) ("DSM-IV-TR"). Both tests involve three components: (1) subaverage intellectual functioning (indicated by a standardized IQ test score of 50-55 to approximately 70); (2) accompanied by concurrent limitations in adaptive functioning; and (3) manifestation of mental retardation before age 18.

In an attempt to enforce *Atkins* the OCCA adopted a test in *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). *Murphy* facially tracks the language in footnote 3 of the *Atkins* opinion, but the state court has adopted a bright-line rule which is over inclusive of the definitions of mental retardation set out in MR-DCSS and the DSM-IV-TR. While MR-DCSS and DSM-IV-TR would exclude an individual with an IQ score above a certain limit, the OCCA set a bright-line rule that any test score of 70 or below will support a finding of mental retardation regardless of how high other IQ scores are.

Additionally, both MR-DCSS and DSM-IV-TR require a nexus between the subaverage intellectual functioning and the limitations in adaptive functioning before mental retardation may be diagnosed. The OCCA has set another bright-line rule that there need only be a showing of deficits in adaptive functioning and that a criminal defendant claiming to be mentally retarded need not show that

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[2] The AAMR released a newer edition of MR-DCSS in 2002. Petitioner's citations to "MR-DCSS" will be in reference to the pagination in this 10th Edition, unless otherwise noted.

his deficits are a result of subaverage intellectual functioning.

Applying these bright-line rules, the OCCA reversed the verdicts of three juries that found Lambert, Pickens, and Salazar had not proven they were mentally retarded by preponderance of the evidence in the name of the Eighth Amendment and *Atkins*. Despite evidence in the record that would support the jury verdicts under the definitions set forth in footnote 3 of the *Atkins* decision, and in concert with the definitions of MR-DCSS and DSM-IV-TR, the OCCA reversed the verdicts and modified the sentences of death to life imprisonment without parole.

There are twelve states without legislation enforcing *Atkins* with a death row population of approximately 1300. Because the instant case is based on published precedent from the OCCA, certiorari should be granted to clarify that the bright-line rules the state court has adopted is over-inclusive and that the Eighth Amendment and *Atkins* do not demand modification of a capital sentence merely because there is some evidence of mental retardation exclusive of evidence to the contrary. This Court should grant certiorari also to vacate the OCCA's modification of the respondents' death sentences.

REASONS FOR GRANTING WRIT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court identified mentally retarded criminal offenders as a class for which capital punishment would violate the Eighth Amendment proscription against cruel and unusual punishment. While *Atkins* discerned a national consensus had developed against execution of mentally retarded

murderers, it did not provide a bright-line rule as to how a State should distinguish between a criminal offender that possessed low intelligence or borderline mental retardation and those who are so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. *Atkins*, 536 U.S., at 317. As the Oklahoma Legislature has not adopted legislation to enforce *Atkins'* constitutional restrictions, the OCCA adopted a definition of mental retardation that facially conforms with *Atkins* but has drawn a bright-line rule that is over-inclusive by including, as mentally retarded, defendants who do not fall within the definitions set forth by MR-DCSS or DSM-IV-TR, the two authorities relied on in *Atkins*. 536 U.S., at 308 n. 3. As a result, the OCCA has improperly invoked the Eighth Amendment and *Atkins* to modify sentences of death where three capital murder defendants failed to prove they were mentally retarded by preponderance of the evidence.

Atkins Identified a Category of Exclusion, but Did Not Define the Perimeters of that Exclusion.

In *Atkins*, this Court confirmed "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," *id.*, at 306, but held that a national consensus had developed that execution of mentally retarded offenders is now a cruel and unusual punishment prohibited by the Eighth Amendment.

The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S., at 317 (quoting *Penry*, 492 U.S., at 331). Having found a national consensus grounded in eighteen (18) state statutes prohibiting

execution of the mentally retarded, this Court concluded that the Eighth Amendment prohibited execution of mentally retarded defendants. *Atkins* noted that these statutes were not identical. One commentator reviewing the statutory schemes in place at the time of *Atkins*, noted, "[t]here is no uniformity in the states' current definitions of mental retardation, and consequently, someone who is legally retarded in one state may not be in another." Alexis Krulish Dowling, POST-*ATKINS* PROBLEMS WITH ENFORCING THE SUPREME COURT'S BAN ON EXECUTING THE MENTALLY RETARDED, 33 Seton Hall L. Rev. 773, 788 (2003); *see id.*, at 788-93. *Atkins* glossed over these serious dissimilarities in asserting that they "generally conform to the clinical definitions set forth in n. 3, *supra*." 536 U.S., at 317 n. 22. Footnote 3 in *Atkins* quoted from the definitions of mental retardation promulgated in MR-DCSS and DSM-IV-TR. The Court then left to the states how best "to enforce the *constitutional restrictions*" identified in *Atkins*. 536 U.S., at 317 [emphasis added]. From this it follows that the "constitutional restrictions" this Court has identified – ineligibility of mentally retarded murderers for the death penalty – conform to the definitions set forth in MR-DCSS and DSM-IV-TR.

Atkins presents great difficulties for the state courts. *See* Kelly Christine Elmore, *ATKINS V. VIRGINIA*: DEATH PENALTY FOR THE MENTALLY RETARDED – CRUEL AND UNUSUAL – THE CRIME, NOT THE PUNISHMENT, 53 DePaul L. Rev. 1285, 1338-40 (Spring 2004); Dowling, POST-*ATKINS* PROBLEMS, 33 Seton Hall L. Rev., at 802-10. These difficulties are compounded when a state legislature has not accepted the invitation extended by *Atkins* to adopt laws enforcing this new constitutional restriction.

"To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S., at 317. In leaving it to the states to develop appropriate ways to enforce the constitutional restrictions, *Atkins* certainly did not foreclose legislation that might provide greater protection on state law grounds than that required by the Eighth Amendment – indeed, such is the proper province of a state legislature. In the absence of state legislation, however, the state court may apply the federal constitutional restrictions against execution of mentally retarded murderers only so far as this Court has extended the Eighth Amendment right. A state court could read greater protections into its state constitution, but may not do so in the name of the Eighth Amendment.

THE OCCA HAS ADOPTED A TEST MATERIALLY DIFFERENT FROM THE MR-DCSS and DSM-IV-TR STANDARDS FOR MENTAL RETARDATION.

As noted above, the OCCA adopted a definition of mental retardation for purposes of capital punishment in *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). This definition appears to comply with *Atkins* by tracking the definition set forth by the AAMR in MR-DCSS – the very definition cited with approval by this Court in *Atkins*. The OCCA has now imposed an additional requirement, however, that totally deviates from the MR-DCSS and DSM-IV-TR definitions of mental retardation. The Oklahoma court's decisions in respondents' cases essentially hold that so long as there exists any evidence of an offender's alleged mental retardation, the Eighth Amendment prohibits his or her

execution. Based on this over-inclusive interpretation of *Atkins*, the OCCA invalidated on Eighth Amendment grounds three separate jury verdicts finding that Salazar, Lambert and Pickens are not mentally retarded, despite evidence fully supporting those verdicts.

Review of the clinical definitions of mental retardation set forth in the MR-DCSS and DSM-IV-TR make this point clear. As the AAMR's definition does not require an IQ score at or below a certain level, it appears that *Atkins* does not require a particular IQ for a capital murder defendant to escape imposition of the death penalty. The AAMR, however, states that the "'intellectual functioning' criterion for diagnosis of mental retardation is approximately two standard deviations below the mean," i.e., a score of 70, giving due consideration for standard error of measurement. MR-DCSS 58. The MR-DCSS provides tables showing the standard error of measurement for the most common tests used in diagnosing mental retardation. *Id.*, at 67-71. The APA has noted that "mild mental retardation" is typically used to describe people with an IQ level of 50-55 to approximately 70. DSM-IV-TR 42. This greatly suggests that evidence of IQ scores below 70 would support, but not necessarily prove, a finding of mental retardation, but that a score well above 70 may alone be sufficient to negate a finding of mental retardation for Eighth Amendment purposes.

The basis for the OCCA's modification of sentences in the instant cases is the Eighth Amendment and this Court's pronouncement in *Atkins*. App. 4-5, 58-59, 99-100.

Murphy defined mental retardation in line with *Atkins*:

> "A person is 'mentally retarded': (1) if he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) the mental retardation manifested itself before the age of eighteen (18); and (3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.
>
> "It is the defendant's burden to prove he or she is mentally retarded by a preponderance of the evidence at trial. Intelligence quotients are one of the many factors that may be considered, but are not alone determinative. However, no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test."

54 P.3d at 556-57. This is consistent with the definitions in footnote 3 of *Atkins*. Additionally, the OCCA has stated that the burden is on the defendant and that he must prove his mental retardation by preponderance of the evidence. The Oklahoma court further held that upon review of a jury determination that a murderer has failed to prove mental retardation by preponderance of the evidence, the court would view the evidence in the light most favorable to the State, similar to the test prescribed

in *Jackson v. Virginia*, 443 U.S. 307 (1979). It used this standard of review to affirm jury verdicts in *Myers v. State*, 130 P.3d 262 (Okla. Crim. App. 2005), and *Hooks v. State*, 126 P.3d 636 (Okla. Crim. App. 2005), and has reaffirmed that standard after the instant cases in *Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006). Yet in the instant cases, the court deviated from the MR-DCSS and DSM-IV-TR standards by reversing the jury verdicts based on bright-line rules that are over-inclusive compared to the test for mental retardation set forth by the AAMR and APA.

THE OCCA REVERSED THESE JURY VERDICTS DESPITE EVIDENCE EXCLUDING EACH OF THESE RESPONDENTS FROM THE CLASSIFICATION OF MENTAL RETARDATION UNDER THE MR-DCSS and DSM-IV-TR STANDARDS.

In *Atkins*, a death row inmate had a scored IQ of 59. This Court did not remand with directions to the Virginia Supreme Court that it must re-sentence the petitioner to a sentence less than death. In reversing *Penry*, and in light of the factual question whether the petitioner was mentally retarded under the tests set forth by the MR-DCSS and DSM-IV-TR, this Court remanded for further proceedings consistent with the opinion. Thus, *Atkins* did not preclude re-trial by jury on the question of a criminal defendant's mental retardation. *See Atkins v. Comm.*, 581 S.E.2d 514 (Va. 2003).

In the instant cases, however, the OCCA not only rejected the findings of respondents' juries that the respondents were not mentally retarded, but ordered in the name of the Eighth Amendment that their sentences be modified to life without parole. This despite existence of IQ scores higher than that reported in *Atkins*. Pickens had

full scale IQ scores from 70 to 79 (Pickens *Atkins* Tr. 580); the latter score of 79, reflected in Defense Exhibit 18 at Pickens' mental retardation jury trial, would exclude him from a diagnosis of mental retardation under both the MR-DCSS and DSM-IV-TR definitions. Salazar also had full scale IQ scores that would exclude him from a mental retardation classification. Salazar's IQ scores ranged from 76 to 86.[3] (Salazar *Atkins* Tr. IV, 215-16). Lambert returned the lowest full scale IQ scores, with scores ranging from 58 to 69 (Lambert *Atkins* Tr. 1318, 1336); nevertheless, he had a score higher than the petitioner in *Atkins*. The Standard Error of Measurement for that test indicated Lambert's true IQ score could be as low as 65, but as high as 73, *id.* at 1319, which would be inconsistent with the definition of mental retardation in MR-DCSS and DSM-IV-TR. Because a diagnosis of mental retardation under the MR-DCSS and DSM-IV-TR standards is not based on IQ scores alone, neither standard would support the actions of the OCCA in modifying the sentences rather than remanding for a new trial. Neither *Atkins* nor the Eighth Amendment compelled the State court to modify the sentences in this case.

All IQ scores for Pickens were above 70, except one, which was *at* 70. His refusal to submit to adaptive functioning tests by either prosecution or defense experts, upon remand for his mental retardation trial, suggests a calculated decision to keep from the jury significant evidence that militated against his claim and would

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[3] Salazar did return one full scale score of 68 when he was tested by the state's expert in anticipation of his *Atkins* jury trial. The expert noted, however, that there was evidence that Salazar was malingering during testing. (Salazar *Atkins* Tr. IV, 184).

support a conclusion by his jury that Pickens' intelligence was not "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S., at 317.

The Oklahoma court's refusal to consider the totality of IQ scores for Pickens, Lambert and Salazar, several of which would disqualify them from a finding of mental retardation under the MR-DCSS and DSM-IV-TR definitions, was compounded by the state court's focus in the instant cases on historical, as opposed to present, limitations in adaptive functioning. In addition to IQ test scores, the tests set forth in *Atkins* speak to present rather than historical limitations. The MR-DCSS is very clear about this: "Mental retardation refers to substantial limitations in *present* functioning." The "significantly subaverage intellectual functioning" that characterizes mental retardation "exist[s] concurrently with related limitations" in certain "applicable adaptive skill areas." The DSM-IV-TR test states that Criterion A "*is* accompanied by significant limitations in adaptive functioning" (Criterion B). *Murphy* likewise noted that mental retardation has to do with present functioning at a significant subaverage intellectual level, that "*is* accompanied by significant limitations in adaptive functioning."

The adaptive functioning evidence relied primarily upon by the state court concerning Pickens, however, dealt with alleged deficits from childhood and adolescence. For example, the court cited evidence that Pickens did not learn to put his shoes on the right feet until he was nine years of age. *Pickens*, 126 P.3d at 615. This may be relevant to whether a present diagnosis of mental retardation was manifested prior to age 18 years, but ignores the fact Pickens currently wears his shoes on the correct feet and

has done so consistently since the age of nine. This does not show that he *presently* functions at a significantly subaverage intellectual level, *presently* is substantially limited in his abilities, or that his "mental retardation" is *presently* accompanied by significant limitations in self-care or self-direction.

Since Pickens had been in custody the majority of his adult life, his refusal to submit to examinations by prosecution or defense experts certainly prevented much evidence concerning his current intellectual capacity and functioning ability from being developed. But since he bore the burden at the mental retardation trial and he refused to submit to testing of his current mental condition, the absence of evidence should have been held against him rather than the prosecution. To allow the sort of pre-adult anecdotal evidence the OCCA relied on to serve as the sole or primary proof that significant limitations in adaptive functioning presently accompany significantly subaverage intellectual functioning would allow criminal defendants of subnormal intellect who nevertheless do not fall within the range of mentally retarded offenders about which there is a national consensus to evade a just punishment.

"Although reliance on a general functioning IQ score has been heatedly contested by some researchers . . . , it remains, nonetheless, the measure of human intelligence that continues to garner the most support within the scientific community [citation]." MR-DCSS 51. *See* Trowbridge, US SUPREME COURT FINDS EXECUTION OF THE MENTALLY RETARDED "CRUEL AND UNUSUAL" (April 2003) <http://www.trowbridgefoundation.org/docs/execution.htm> 4-6 [as of April 4, 2006] (Trowbridge). Accordingly, "[s]ignificant limitations in intellectual functioning are determined from the findings of assessment by using a valid and

comprehensive, individual measure of intelligence that is administered in a standardized format and interpreted by a qualified practitioner." DSM-IV-TR 13. In short, where, as here, IQ scores are available, general intellectual functioning is primarily determined by the defendant's full scale IQ score. It is this score which best represents the "functional" or "operational" IQ – the defendant's overall general intellectual functioning. *See* MR-DCSS 66 (relying on "global [general factor] IQ" as measure of intellectual functioning).

Moreover, there must be a nexus between the mental retardation and the limitations in adaptive skills. "Mental retardation . . . is characterized by significantly subaverage intellectual functioning, *existing concurrently* with related limitations . . . . " MR-DCSS [9th ed.] 5 [emphasis added]. "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that *is accompanied* by significant limitations in adaptive functioning . . . . " DSM-IV-TR 41.

If there were no requirement of a nexus, then the AAMR and the APA would not be concerned with evaluating the many factors that may color whether these limitations are in fact probative of mental retardation. "The individual's culture or ethnicity, including . . . customs that might influence assessment results, must be considered in making a valid assessment." MR-DCSS 8. Thus, "[a]daptive behavior scores must be examined in the context of the individual's own culture that may influence opportunities, motivation, and performance of adaptive skills." MR-DCSS 75. Furthermore, the fact finder must discern whether the failure to learn adaptive skills is

based on other reasons than subaverage intellectual function:

> "A person whose opportunities to learn adaptive skills have been restricted in comparison to age peers may have acquisition or performance deficits *that are unrelated to mental retardation.* For example, a person who has not been provided opportunities to make purchases may lack the adaptive skills needed for shopping. Likewise, a person who has not been taught to use money will not have this skill, regardless of his or her potential to understand the concept and use the skill when needed. . . . If these factors, which also contribute to individual functioning . . . , are considered to contribute to lowered scores on adaptive behavior measures, this should be taken into account when scores are interpreted."

MR-DCSS 86 [emphasis added]. The AAMR thus emphasizes that there *must* be a connection between lack of intellectual capacity and the significant limitations in adaptive skills.

The OCCA has wholly disregarded this requirement for a nexus:

> A defendant must show he has significant limitations in adaptive functioning, *but is not required to show that mental retardation is the cause of his limitations in these skill areas.*

Lambert, 126 P.3d at 651 [emphasis added]. In granting relief, the court wholly discounted the State's evidence offering "alternative explanations for these limitations." *Id.*, at 652-53. The court similarly discounted disqualifying high IQ scores in Pickens' case:

> That more than one test was administered and/or *that more than one score is above 70 does not matter*; only one test score of 70 or below needs to be shown for a defendant to "get his foot in the door" and claim ineligibility for the death penalty by reason of mental retardation.

Pickens, 126 P.3d at 616 [emphasis added]. And in finding Salazar had proven he was ineligible for the death penalty, the court noted that at his *Atkins* jury trial that he "presented evidence of intelligence testing reflecting *at least one score below seventy (70)*." *Salazar*, 126 P.3d at 628 [emphasis added].

The OCCA has thus set a bright-line rule in these cases that any score of 70 or below, regardless of the existence of other IQ scores that would exclude a diagnosis of mental retardation under the MR-DCSS and DSM-IV-TR standards, demands a finding of significant subaverage intellectual functioning. Further, the OCCA has set a bright-line rule that allows a finding of mental retardation regardless of whether there is any connection between a finding of significant subaverage intellectual functioning and adaptive functioning deficits alleged by a capital murder defendant. These bright-line rules have resulted in the invalidation of three death sentences, on Eighth Amendment grounds, because the defense presented *some* evidence to support the proposition that Lambert, Salazar and Pickens were mentally retarded. The Oklahoma court's judgment in this regard is so over-inclusive that it makes ineligible for the death penalty capital murder defendants who are not mentally retarded.

In *Atkins*, this Court identified several policy reasons for excluding mentally retarded murders from the death penalty. One was that mentally retarded persons have a

diminished capacity in certain areas, such as capacity to abstract from mistakes and to learn from experience. Pickens learned from his mistake of leaving convenience store clerks alive. After getting out of prison, he returned to the convenience store after taking some drugs to get his nerve up and he drove by the store to confirm the clerk was alone before robbing it. (Pickens *Atkins* Tr. 546-47). By killing the clerk, he prevented his arrest and prosecution and a short time later was able to commit robberies of other convenience stores. He was caught on the third robbery only because his gun failed to function and he failed to kill the clerk. *Pickens v. State*, 19 P.3d 866, 872 (Okla. Crim. App. 2001). Thus, Pickens manifested an ability to learn from his prior experience and to engage in logical reasoning.

After Lambert and his juvenile co-defendant robbed their victims, they locked them in the trunk of a car and set it on fire. They then successfully evaded the police and went to Kansas where Lambert checked into a motel under a different name. There was substantial evidence that Lambert was the leader during much of the criminal activities involving him and his co-defendant. (Lambert *Atkins* Tr. 860-62, 1245, 1886, 1883). This demonstrated no subaverage limitations in logical reasoning, in understanding the reaction of others, and in understanding and processing information.

The respondents killed in order to prevent the victims from identifying them; in the cases of Pickens and Salazar, their sentencing juries so found beyond a reasonable doubt. Such a decision necessarily involves capacity to reason, to understand the reaction of others, and to learn from experience. As noted above, Lambert drove his

victims out into the country after robbing them and burned them alive in the trunk of a car.

Atkins further noted retribution as a goal of capital punishment depended on the culpability of the offender. *Atkins* concluded that mentally retarded persons must be less culpable than that narrow class of murderers that reflect "a consciousness more 'depraved' than that of any person guilty of murder." 536 U.S., at 319 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)). Therefore, execution of mentally retarded offenders violates the Court's narrowing jurisprudence.

The evidence reflecting the depraved consciousness of Pickens, Salazar, and Lambert also excludes them from classification as mentally retarded. Pickens planned to kill his victim to avoid apprehension. He confirmed there would be no witnesses to the murder. A second victim fell within days and only gun malfunction prevented a third murder. Salazar's home invasion turned fatal for a 9 year old girl because he could persuade her to go back to bed quietly before he stabbed her in her own bed. He later realized he had inadvertently left incriminating evidence in his car that the police would find, demonstrating his capacity to reason logically. Lambert attempted a double homicide before committing the instant homicides then went to Kansas to avoid arrest, where he raped women in two different incidents. Witnesses testified Lambert was the leader in this crime spree. As the evidence supported the separate jury findings that Pickens, Lambert and Salazar were not mentally retarded, there is no basis for stating that retribution was an improper basis for the death penalty in any of these three cases.

The Court also noted that the goal of deterrence was not met by execution of the mentally retarded, as the death penalty serves as a deterrent only when murder is the result of premeditation and deliberation, 536 U.S., at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). In the cases of Pickens and Lambert, none of the murders were impulsive but were the result of premeditation and deliberation. For Pickens in particular, the "cold calculus that precede[d his] decision," 536 U.S. at 319 (quoting *Gregg*, 428 U.S., at 186), to kill the clerk after robbing the convenience store definitely put him "at the opposite end of the spectrum from behavior of mentally retarded offenders." 536 U.S., at 319-20. Salazar's burglary was certainly not impulsive and when he was confronted by the 9 year old girl, he had presence of mind to talk her into going back to bed where he could kill her quietly and make his escape without detection.

Finally, *Atkins*' concern that mentally retarded persons suffer a risk of obtaining the death penalty in spite of factors calling for a lesser sentence, 536 U.S. at 320, further demonstrates that Salazar, Lambert, and Pickens fall outside the classification of mentally retarded offenders for whom there is now a national consensus. The Court noted the risk of false confessions and the lesser ability to make persuasive showings of mitigation supported a finding that mentally retarded persons, as a category, should not be subject to the death penalty.

Giving false statements to *exculpate* himself, Salazar verbally sparred with a veteran agent of the Oklahoma State Bureau of Investigation for a considerable period of time before admitting guilt. (Salazar *Atkins* Tr. IV, 66-70, 199, 211). Evidence of the burglary found in his car corroborated his guilt. *Salazar v. State*, 973 P.2d 315, 324

(Okla. Crim. App. 1999). Pickens also began his statement to Deputy Fugate with a false alibi. When caught with his lies, he gave a second false *exculpatory* statement. Only after further confrontation with inconsistencies did he tell the truth (Pickens *Atkins* Tr. 544-45).

As to ability to make a persuasive showing of mitigation, it was noted at his *Atkins* jury trial that Lambert changed his demeanor during prior jury proceedings. When the jury was present, he behaved subdued; when it was gone, he was smiling and animated. (Lambert *Atkins* Tr. 1450-52, 1624-28). Lambert's non-courtroom behavior and his ability to communicate intelligently and respond logically was demonstrated in State's Exhibit 80, the recording of his jail phone call during his mental retardation trial. *Id.*, at 1864-65, 1894. In that conversation, Lambert told his sister, *inter alia*, not to talk about his case since the call could be recorded and when she persisted, he redirected the conversation.

The OCCA has drawn a bright-line rule for mental retardation that is over-inclusive (1) by ignoring disqualifying IQ scores under the MR-DCSS and DSM-IV-TR tests, so long as there is at least one score at 70 or below, regardless of malingering; and (2) by ignoring the lack of a nexus between subaverage intellectual capacity and concurrent significant limitations in adaptive functioning. It has used that standard, in the absence of state legislation, to conclude the Eighth Amendment and *Atkins* mandated modification of these death sentences although Salazar, Lambert, and Pickens fell outside the definitions of MR-DCSS and DSM-IV-TR. *See Blonner v. State*, 127 P.3d 1135, 1146 (Okla. Crim. App. 2006).

AS THE PRECEDENTIAL EFFECT OF THESE CASES EXTEND BEYOND OKLAHOMA, THERE IS A GREATER NEED FOR THIS COURT TO GRANT CERTIORARI TO ADDRESS THESE ISSUES.

Oklahoma is not the only state that has failed to adopt legislation in response to *Atkins*. Of the twenty (20) states that had not adopted legislation excluding execution of mentally retarded offenders at the time *Atkins* was decided, only eight have now done so,[4] leaving twelve (12) states that are still without statutes enforcing the constitutional restriction identified in *Atkins*.[5] This is not a trivial issue. These twelve states have approximately 1300 individuals incarcerated on death row at present. <http://www.deathpenaltyinfo.org/FactSheet.pdf> p. 2 [as of April 4, 2006].

Moreover, even if Oklahoma or any of these other states were to adopt statutes to enforce *Atkins*, the precedential effect of these three cases will continue to have a pernicious effect in capital litigation in which mental retardation is claimed.

Petitioner submits this Court should grant a writ of certiorari in these cases in order the clarify the distinction between mentally retarded criminal offenders for whom a

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[4] These eight states are California (CAL. PENAL CODE § 1376 (West 2004)), Delaware (DEL. CODE ANN. tit. 11, § 4209(d)(3) (2005)), Idaho (IDAHO CODE § 19-2515A (2003)), Illinois (725 ILL. COMP. STAT. 5/114-15 (West 2003)), Louisiana (LA. CODE CRIM. PROC. ANN. art. 905.5.1 (West 2003)), Nevada (NEV. REV. STAT. § 174.098 (2003)), Utah (UTAH CODE ANN. § 77-15a-101 (2003)) and Virginia (VA. CODE. ANN. § 19.2-264.3:1.1 (West 2003)).

[5] These states are Alabama, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Wyoming.

national consensus against execution has developed and those mentally retarded or low intelligence offenders for whom no such consensus exists to prevent their lawful execution for murder. There is a need for further guidance from this Court to show the distinction between the constitutional restriction set forth in *Atkins* and the over-inclusive interpretation of *Atkins* employed by the OCCA. Petitioner further requests this Court to grant certiorari to reverse the OCCA's reversal of the jury verdicts in these three cases and to vacate its modification of the death sentences to life imprisonment without parole.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decisions of the Oklahoma Court of Criminal Appeal. The decisions are contrary to the law of this Court and further guidance is needed from this Court in drawing the line that circumscribes mentally retarded offenders for whom the death penalty is unconstitutional.

Respectfully submitted,

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2005 OK CR 27

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARRIN LYNN PICKENS,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent.

FOR PUBLICATION
Case No. PCD 2002-983

OPINION GRANTING POST-CONVICTION RELIEF AFTER REMAND FOR JURY DETERMINATION ON ISSUE OF MENTAL RETARDATION

(Filed Dec. 7, 2005)

¶1 Petitioner, Darrin Lynn Pickens, was convicted by a jury in Creek County District Court, Case No. CF 1990-66, of First Degree Murder, while in the commission of Robbery with a Dangerous Weapon, in violation of 21 O.S.Supp.1989, § 701.7 (Count 1) and Feloniously Carrying a Firearm, in violation of 21 O.S.Supp.1989, § 1283 (Count 2).[1] The jury set punishment at death on the murder conviction and ten (10) years imprisonment on Count 2.[2] We affirmed Petitioner's conviction and death

[1] Petitioner's original convictions for First Degree Murder, Feloniously Carrying a Firearm, and Robbery with Firearms were reversed and remanded for new trial in *Pickens v. State*, 1994 OK CR 74, 885 P.2d 678, *overruled in part on other grounds, Parker v. State*, 1996 OK CR 19, ¶ 23, 917 P.2d 980, 986, *n.* 4.

[2] The jury found the following aggravating circumstances: (1) that Pickens had previously been convicted of a felony involving the use or threat of violence against the person; (2) that the murder was committed for the purpose of avoiding or preventing lawful arrest or prosecution; and

(Continued on following page)

sentence for First Degree Murder, but we reversed Petitioner's conviction for Robbery with a Dangerous Weapon and remanded for a new trial.[3] *Pickens v. State,* 2001 OK CR 3, 19 P.3d 866. Petitioner's first Application for Post-Conviction Relief was denied. *Pickens v. State,* PCD 2000-285 (Okl.Cr. August 30, 2001) (not for publication). The United States Supreme Court denied his Petition for Writ of Certiorari on June 28, 2002. *Pickens v. Oklahoma,* 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 842 (2002).

¶2 On October 14, 2002, Petitioner filed a Second Application for Post-Conviction Relief, pursuant to 22 O.S.2001, § 1089, and a Motion for Evidentiary Hearing, pursuant to Rule 9.7(D), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2002). On July 23, 2003, this Court granted post-conviction relief on Proposition One and remanded the case to the District Court of Creek County for a jury determination on the

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(3) that there existed the probability that Pickens would commit criminal acts of violence that would constitute a continuing threat to society.

[3] Petitioner was also convicted of murder and other crimes in Tulsa County District Court, Case No. CF 90-717, and his convictions and sentences were affirmed by this Court. *Pickens v. State,* 1993 OK CR 15, 850 P.2d 328, *cert. denied,* 510 U.S. 1100, 114 S.Ct. 942, 127 L.Ed.2d 232 (1994), *denial of post-conviction relief affirmed in* 1996 OK CR 6, 910 P.2d 1063. On federal habeas review, Petitioner was granted relief from his death sentence and the case was remanded to the district court with instructions to grant the writ, conditioned upon the state court's conducting a new sentencing trial or commuting petitioner's sentence to life imprisonment or life imprisonment without parole. *Pickens v. Gibson,* 206 F.3d 988, 1003 (10th Cir. 2000). Pickens subsequently waived jury trial on resentencing in exchange for a sentence of life imprisonment without parole. *See* Tulsa County District Court Docket, Case No. CF 90-717 (September 4, 2001).

issue of mental retardation. *Pickens v. State,* 2003 OK CR 16, 74 P.3d 601. The jury trial on mental retardation was held before the Honorable Donald D. Thompson, District Judge, on February 17th – 20th, 2004. The jury returned a verdict that Mr. Pickens is not mentally retarded, and the trial court filed Findings of Fact and Conclusions of Law on April 13, 2004.[4] Mr. Pickens filed a Supplemental Brief and raised four (4) propositions of error.[5] The State of Oklahoma did not file a brief.[6]

¶3 On appeal, Petitioner challenges the jury's verdict as contrary to the weight of the evidence. A defendant must prove mental retardation by a preponderance of the evidence. *Myers v. State,* 2005 OK CR 22, ¶ 6, ___ P.3d ___; *State ex. rel. Lane v. Bass,* 2004 OK CR 14, ¶ 8, 87 P.3d 629, 631-632; *Lambert v. State,* 2003 OK CR 11, ¶ 4, 71 P.3d 30, 32. Pickens was required to show, by a preponderance of the evidence, that he met the three (3) pronged definition set forth in *Murphy v. State,* 2002 OK CR 32, ¶ 31, 54 P.3d 556, 567-568: sub-average intellectual ability which limits his ability to understand and process

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[4] While the trial court's findings of facts and conclusions of law assist this Court in its decision, the jury is the finder of fact in this proceeding. *Myers v. State,* 2005 OK CR 22, ¶ 7, ___ P.3d ___.

[5] Mr. Pickens claims he presented sufficient evidence to prove he is mentally retarded. He also claims his constitutional right to a competent tribunal was compromised because the judge presiding over the trial was mentally impaired; the trial court erred in instructing the jury that mental retardation must be "present and known" before age 18; and the trial court erred by denying Mr. Pickens' request to submit non-unanimous verdict forms to the jury.

[6] Pursuant to *Salazar v. State,* 2004 OK CR 4, ¶¶ 7-9, 84 P.3d 764, both parties had twenty (20) days from the date the trial court filed its Findings of Fact and Conclusions of Law or from the filing of the transcripts, whichever is later, in which to file a supplemental brief.

information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses and to understand the reactions of others; manifestation before age eighteen (18); and significant limitations in adaptive functioning in at least two of nine skill areas. *See Myers, id.; State ex.rel. Lane v. Bass, id.; Lambert, id.* The jury was required to weigh the evidence presented by the parties and determine whether Petitioner met his burden of proof that he is mentally retarded. *Myers, id.*

> Whether a person is mentally retarded is a question of fact. In evaluating questions of fact decided by a jury we give great deference to the jury's finding. We will not disturb the jury verdict where there is any competent evidence reasonably tending to support it. *See Johnson v. State,* 2004 OK CR 23, ¶ 10, 93 P.3d 41, 44-45.

(footnote omitted) *Myers, id.*

¶4 On appeal, when a petitioner challenges a jury's determination that he/she is not mentally retarded, we review the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion. *Id.* After complete review of the records, transcripts, exhibits and pleadings in this case, we find the jury's verdict is contrary to the evidence, even in the light most favorable to the State, and we find Petitioner met his burden of proving, by a preponderance of the evidence, that he is mentally retarded.

¶5 The record shows Pickens met all three prongs of the *Murphy* definition of mental retardation. He presented testimony from school teachers, a school administrator, a public school psychologist, and a school superintendent that he scored in the borderline to low range on intelligence

tests to qualify him for placement in the Sand Springs Public School classes for the "educable mentally handicapped" (EMH). He attended those classes from third to twelfth grade and, while he did graduate from high school, he graduated from EMH classes. His grades, acceptable for an EMH student, were given not based upon his comparison to mainstream students but rather were based upon his own performance in relation to his Individual Education Program (IEP).

¶6 His teachers all testified he was of sub-average intellectual level and functioned at about a third to fifth grade level in verbal skills and a sixth to eighth grade level in math skills. His school EMH placement and performance showed his deficits in academics. His teachers all agreed he had significant communication deficits and his verbal skills were low. Although he was able to talk, carry on conversation and print, he did so at the level of a ten year old or fourth grader. Department of Corrections (DOC) personnel also confirmed Pickens's communications deficits, noting things had to be explained to him in simple terms and simple words. Upon entry into Oklahoma's prison system, Pickens was tested and failed the literacy test. One DOC witness testified that if he were in school, he would be placed in the fourth grade.

¶7 His teachers, and family members through interviews with Pickens's expert witness, reported Pickens had deficits in self-care. His elementary EMH teacher reported his physical appearance was "ragged and wrinkled"; his personal hygiene was very poor; his hair was not combed. His personal hygiene was described as not normal for a fourth grader.

¶8 Family members reported Pickens wore his shoes on the wrong feet up to the age of nine; his siblings tried to teach him to identify his big toe and small toe and to line the shoes up in front of them, but he could not figure it out. At the age of nine or ten, he still routinely buttoned his shirt askew, wore it inside out and did not recognize either of those things until someone pointed it out. He was eleven or twelve before he learned to tie his shoes. He did not brush his hair and left it matted. He had to be reminded to brush his teeth long after a normal child would have assumed that function independently. He had to be told to bathe even when he had noticeable body odor. Other children reportedly made fun of him because of his appearance and grooming. Dr. Cunningham testified this information suggested Pickens had "significant deficits in self-care well after you would expect those capabilities to be established." He testified this deficit overlapped into the area of "self-direction in terms of brushing teeth, bathing, that kind of thing."

¶9 Pickens also presented evidence of deficits in the area of social judgment and planning ability. In elementary school, he was a loner and did not get along well with other children. At fourteen, when tested by the public school psychologist, his test results revealed deficits in social skills and social judgments. The results showed his inability to size up social situations and to know what appropriate thing should happen which reflected a problem with social skills and ability to plan. At fourteen, Pickens was unable to identify the areas of the body where his heart and lungs were located, which reflected a lack of knowledge in the areas of basic physiology. In the area of safety, Pickens reportedly threw gasoline on a smoldering

fire despite being told not to and suffered serious burns as a result.

¶10 Pickens presented evidence attending to each prong of *Murphy*. His evidence demonstrated sub-average intellectual functioning, before the age of eighteen, and adaptive functioning deficits in at least two skill areas. He was required to prove each prong of *Murphy* by a preponderance of the evidence and the record reflects that he did.

¶11 The State's case focused primarily on Pickens's IQ scores. Pickens was administered four intelligence tests between 1973 and 1990 with scores ranging from 70 to 79. He was first tested at seven years old and scored a 71; he was tested again in seventh grade and scored a 79; he was tested at fourteen and scored a 70. His last test was given after he was incarcerated in DOC, and he scored 76. Although the State's expert, Dr. Call, opined the better indicator of Pickens's actual IQ was an "average" of all his test scores, he admitted there was no reason to discount the reliability of the tests given to him prior to the age of eighteen and also admitted the score of 70 from the 1980 test was good enough to meet the IQ test requirement set forth in *Murphy*.[7] These test scores, from 70 to 79, while not determinative, tend to illustrate Pickens functions at a significantly sub-average intellectual level.

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[7] This testimony obviously referenced the requirement that a defendant must first show a score of 70 or below on a contemporary IQ test to claim he or she is ineligible for the death penalty by reason of mental retardation. *Murphy, id.* This is not a finding to be made by the jury; rather it is a preliminary determination made by this Court or by the trial court in deciding whether a defendant can challenge his sentence based on ineligibility due to mental retardation.

¶12 For the purpose of determining whether one is eligible to raise the issue of mental retardation, a contemporary IQ test includes a test or tests, ostensibly given before the commission of the capital crime, which "may be understood by contemporary standards." *Murphy,* 2002 OK CR 32, ¶ 31, *n.* 21, 54 P.3d at 567. Both experts, for Pickens and for the State, testified the tests administered to Pickens prior to 1990 were appropriate tests at the time they were administered.

¶13 For a defendant to claim he or she is ineligible for the death penalty by reason of mental retardation, the defendant must first show a score of 70 or below on a contemporary IQ test. *Murphy, id.* That more than one test was administered and/or that more than one score is above 70 does not matter; only one test score of 70 or below needs to be shown for a defendant to "get his foot in the door" and claim ineligibility for the death penalty by reason of mental retardation.

¶14 Scores above 70 are relevant to the first prong of *Murphy.* The scores might suggest a defendant's intellectual functioning is or is not sub-average depending on the other evidence of low intellectual functioning. The State and the trial court should be reminded that IQ scores are one of many factors to be considered but "are not alone determinative" of whether a defendant/petitioner is mentally retarded. *Murphy, id.*

¶15 In this case, while Pickens was initially identified at the age of seven with below average intellectual functioning based on his IQ test score of 71, his subsequent school performance, continued low performance on subsequent IQ tests (including another IQ score of 70), and his performance on tests given even after his incarceration

in the Department of Corrections substantiate his low level of intellectual functioning.

¶16 Pickens attended Educable Mentally Handicapped (EMH) classes at Sand Springs Public Schools from third grade through twelfth grade. Judy Copeland, Special Education Coordinator for the Oklahoma Department of Education, testified that children who were mildly mentally retarded were placed in EMH classes and that the school system, in the 1970s and 1980s, did not refer to those children as mentally retarded. To qualify for EMH classes, the student had to have an IQ test score between 55 and 75. The EMH students were taught in self-contained classrooms; they could graduate from high school and their diplomas would not look different from other students' diplomas. They were reevaluated every three years to determine whether placement in EMH was appropriate.

¶17 Dr. Lee Rand Smith, assistant Superintendent of the Sand Springs Public Schools from 1977-1988 and Director of Special Education, confirmed Copeland's testimony, noting the term mentally retarded was "passé" because of the stigma attached to it; those (mildly mentally retarded) children were referred to as EMH or handicapped. Dr. Smith said the goal of EMH classes was to educate the student to the maximum efficiency of his ability. He admitted some EMH students graduated from high school, but their level of functioning was not the same. Some even took driver's education. Dr. Smith said EMH graduates' diplomas would look like other students' diplomas but the transcripts would indicate EMH. He did not think EMH students were included in class rank. Dr. Smith noted EMH students "looked normal" unless there was a genetic problem and some could pass in the

community as a normal person; however, in terms of class work, EMH students could not achieve in a regular classroom setting and had special needs for learning.

¶18 Willard Jones, Pickens's special education teacher in EMH classes from 1974 to 1977, graded Pickens according to his Individualized Education Program (IEP) and did not compare him to other students when grading. He said Pickens made mostly A's and B's in Jones's EMH classes. He said if Pickens's diploma reflected a class rank it would be unfair because Pickens's grades were for EMH classes. Jones said Pickens had difficulty understanding concepts. While he could add, subtract, multiply and divide, his reasoning was not good. His reading level was also very low. He said there was "absolutely, positively, emphatically no doubt" in his mind that Darrin Pickens was mentally retarded.

¶19 Paul Schuster taught Pickens in EMH classes at Charles Page High School from 10th to 12th grade. He said Pickens had difficulty with abstract thinking and logical reasoning; he was quiet and withdrawn. Schuster tried to get him to verbalize more and recommended he be mainstreamed as much as possible in functional math and physical education. In 10th grade, Pickens made a "C" in functional math first semester, but then did not pass the second semester. He was returned to EMH math in 11th grade because he did not succeed in the mainstream class. Schuster said Pickens did not write in cursive; he only printed and it took him a long time. He knew Pickens graduated in May of 1983 from EMH classes and said his reading level was 4th grade when he graduated. He had very poor writing and communication skills.

¶20 When Pickens was sixteen (16), he was re-evaluated by Dr. Patricia Logan, a school psychologist, for his continued placement in the EMH program. His full scale score on the Wechsler Intelligence Scale for Children – Revised (WISC-R) was seventy (70). His developmental age on the Bender Visual Motor Gestalt Test was "within average limits." On the Peabody Individual Achievement Test, his reading recognition and comprehension tested on the second grade level, his spelling and math on the fourth grade level, information on the second grade level, and his overall score fell in the third grade level. He performed "below second grade" level on the Wold Sentence Copying Test and fell within the "second to third grade" level on the Durrell Analysis of Reading Difficulty. Dr. Logan concluded in her written report that Pickens was "presently functioning in the Borderline range of intelligence" and recommended his continued placement in the EMH program. In her deposition prior to the jury trial, Dr. Logan stated Pickens met the definition for mild mental retardation and met the requirements at that time for placement in EMH classes which required an IQ of seventy (70) or below.

¶21 DOC personnel also confirmed Pickens's very low reading/math levels upon his entry into the Department of Corrections. Lisa Reading, Mr. Pickens's corrections case manager at Jackie Brannon Correction Center (JBCC), saw him daily and completed his classification assignment. She placed him in the Adult Basic Education (ABE) class based upon his below sixth grade ability in reading and math. Reading said things had to be explained to Pickens more than once, in "simpler" terms, and multi-syllabic words confused him.

¶22 Leatha Brannon taught Pickens at the JBCC in 1988. His initial test scores in January of 1988 placed him at the first grade level for vocabulary, second grade level for language mechanics and language expression, total reading comprehension at fourth grade level, and total math level at sixth grade level. She wrote an IEP for Pickens and stated his goals were to achieve literacy from fourth to eighth grade levels in three months; her math goal was for him to achieve from sixth to eighth grade level in three months. After six months, his reading level had increased to fifth grade level and his math level had increased to eighth grade. Brannon said Pickens's math skills were stronger than his reading skills, but he functioned in the lower level of her students. She did not think he was faking, and she said he made some progress in her classes.

¶23 This evidence showed by a preponderance of the evidence that Pickens had sub-average intellectual ability which substantially limited his ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

¶24 In a light most favorable to the State, we find the jury's verdict was not supported by competent evidence and no rational trier of fact could have reached the same conclusion. Here, Pickens's evidence showed, by a preponderance of the evidence, that he is mentally retarded and the condition manifested and was identified before the age of eighteen.

¶25 The State's evidence did not refute Pickens's low level of intellectual functioning. The State's expert witness, Dr. Call, did not question the legitimacy of Pickens's

achievement or lack thereof in school; rather, his testimony focused on the lack of written documentation showing a "determination" that Pickens was mentally retarded. We find that opinion specious considering the testimony, in the record, that Pickens was identified by the public school system as "EMH" – the term used to identify mentally retarded students – as early as third grade.

¶26 Although Pickens took functional math for two semesters, physical education, and "work-study" classes, he failed one semester of functional math and even performed poorly in work-study which, according to his high school EMH teacher, was "hard to do." Further, while his official high school transcript reflected a GPA of 2.70 and a class rank of 125 of 328, all of the witnesses who dealt with Pickens while he attended school confirmed his graduation was from the EMH program and his grades were determined by his performance comparison to his own IEP and not by comparison to other students in mainstream classes. The witnesses agreed that ranking him with mainstream students, when he graduated from EMH classes, was not an accurate ranking.

¶27 The State presented evidence suggesting Pickens's ability to fill out request for medical service forms and write letters to the trial court after his incarceration showed his ability to function at a higher level. Review of the medical service requests shows Pickens printed and used simple words and terms to access medical services. Considering that all witnesses agreed his level of communication was somewhere between third and sixth grade, his ability to print simple terms and to articulate simple health related service requests is not surprising. As for the letters Pickens wrote to the court clerk, his use of longer words and ability to express concern over his attorney and

trial dates suggest he understood the trial process and the importance of the proceedings. The State's evidence did not show that Pickens did not copy the letters or actually wrote the letters without assistance with grammar and spelling. While these letters and requests have some value and show Pickens could exercise the normal fluency expected of an early adolescent child, could print, could express concern over his health in the simplest of terms, could express concern about his pending legal matters, and could utilize services available in a structured prison environment, this evidence did not disprove or diminish the other significant evidence of his sub-average intellectual functioning.

¶28 Dr. Mark Cunningham testified a mildly mentally retarded individual can plan, lie, look after himself, dress, identify pain, be romantic, get married, live independently and even have a job. Dr. Cunningham noted he obtained a basic family history from Pickens and said that was not unexpected or unusual. He also said Pickens's description of a woman he loved who died was not inconsistent with mild mental retardation. He admitted it was not unusual for a mildly mentally retarded person to become emotional at loss of love; however, he said Pickens's description of the woman and her disability was "quite inadequate for somebody that he was in love with." Dr. Cunningham said Pickens seemed to have a very limited understanding of what was wrong with his girlfriend and why she died. The State's expert, Dr. Call, also admitted a mildly mentally retarded person could get married, have children, have a job, have friends, use and enjoy television, show emotion, listen, feed and dress themselves, commit crimes, know and remember the names of family members and people they've had contact

with, use complete sentences and obtain academic skills up to about the sixth grade level.

¶29 At trial, Dr. Cunningham testified Pickens admitted to him that he first used PCP at the age of fourteen and probably used it ten (10) times. He also smoked pot at the age of nine (9) or ten (10) and used it regularly from the age of thirteen (13) to fifteen (15). The State also presented evidence that, at least on two occasions, Pickens was written up for being under the influence of alcohol or drugs while in prison. Dr. Logan, the psychologist who tested Pickens while in high school, said that substance abuse could affect an individual's score on verbal and performance tests.

¶30 While we do not discount Dr. Logan's testimony that substance abuse could certainly affect a person's test performance, the record does not indicate Pickens was under the influence of drugs or alcohol or that anyone even suspected he was under the influence of drugs or alcohol at any time when he was administered the various intelligence tests. In fact, when Dr. Logan tested Pickens, she observed that he was friendly, cheerful, cooperative, and worked hard during testing. While his illicit drug use was relevant in that it might have affected his personality and ability, there was no evidence that it in fact did so.

¶31 Even considering the State's evidence that Pickens could print legibly and understandably, that he used drugs in the past, and that he could recount various past events and remember people, Pickens showed, by a preponderance of the evidence, that he functions at a subaverage intellectual level and that he did so, and others recognized it, before he turned eighteen.

¶32 Pickens also showed, by a preponderance of the evidence, significant limitations in adaptive functioning in at least two of the nine skill areas set out in *Murphy*. *Murphy,* 2002 OK CR 32, ¶ 31, 54 P.3d at 567-568. Pickens provided proof of significant limitations in adaptive functioning in five skill areas: academics, communication, self-care, social judgment and planning ability. While the State offered some evidence to refute his adaptive functioning deficits in the area of communication and self-care, the evidence was neither substantial nor compelling. Some of the State's evidence is worth noting as it further reflects the jury's verdict is not supported by competent evidence.

¶33 Two witnesses for the State testified Pickens seemed able to communicate normally with them. Former Creek County Sheriff Larry Fugate said Pickens read his Miranda rights waiver, signed it, and did not ask any questions about it. He testified Pickens lied during his interrogation, made up an alibi, and eventually provided information that "fit" the evidence. Larry Fugate believed Pickens did not have any difficulty communicating with him, but admitted Pickens asked him what some multi-syllable words meant. Former Creek County Deputy Frank Smith said he "transported" Pickens a couple of times and they had "real intelligent conversation." Smith said he and Pickens talked about a number of things and he thought Pickens was intelligent.

¶34 As to the self-care deficits, Mr. Smith said Pickens looked all right when Smith transported him to or from several court proceedings. He was "always dressed very neatly" in his prison outfit. The State also presented several written requests for health services filled out by Pickens while imprisoned to demonstrate his ability to tend to himself or request medical services. As noted

previously, these forms reflect a basic ability to understand health needs at a very simple level. This level of ability is not inconsistent with Pickens's evidence that he functioned at a third to sixth grade level.

¶35 The observations made by school personnel, family members, DOC personnel, and expert witnesses relating to adaptive functioning deficits were not refuted. Although the State argued alternative explanations for Pickens's poor grammar (such as most Oklahomans use poor grammar), poor personal hygiene (poor childhood environment), and poor school performance (poor childhood environment), argument is not evidence and the State's evidence relating to the adaptive function deficits was just as much if not more incidental than Pickens's evidence was. Further, Pickens presented evidence of his poor childhood environment which showed his mother gambled, ran numbers, sold PCP, carried a knife and gun, and was unaffectionate towards him as a child. This evidence, in a light most favorable to the State, does not refute Pickens's evidence of adaptive function deficits; rather, it tends to help explain them.

¶36 Pickens proved all of the facts in the *Murphy* definition by a preponderance of the evidence. Initially, he showed a reliable IQ test under 70. He showed subaverage intellectual functioning and limitations in adaptive functioning in at least two skill areas. These factors were present and known before Pickens turned eighteen. While the jury returned a unanimous verdict that Pickens was not mentally retarded, we find its verdict was not supported by competent evidence and no rational jury could have reached the same conclusion. *Myers,* 2005 OK CR 22, ¶ 7. Further, the jury did not receive the correct

jury instruction and the poorly drafted jury instructions likely contributed to its erroneous verdict.

¶37 The definition of mental retardation given in this case, Instruction Number 4, did not correctly track the language of the uniform jury instruction, as modified in *Lambert v. State,* 2003 OK CR 11, ¶ 4, *n.* 13, 71 P.3d 30, 32, *n.* 13. Instruction Number 4 concluded with the following language:

> If you find that the answer to any of these questions is no, then you must find that the Defendant is not mentally retarded and so indicate on your verdict form.

The instruction adopted at OUJI-CR 2d. 4-68A concludes with the following language:

> If you find by a preponderance of the evidence that the answer to each of these questions is yes, then you must find that the Defendant is mentally retarded and so indicate on your verdict form. You must then decide whether the Defendant shall be sentenced to life imprisonment or life imprisonment without the possibility of parole and so indicate on your verdict form.
>
> If you find that the answer to any of these questions is no, then you must find that the Defendant is not mentally retarded and so indicate on your verdict form. You must then consider the remainder of the instructions relating to the death penalty and decide whether the defendant shall be sentenced to life imprisonment, life imprisonment without the possibility of parole or death.

In *Lambert,* 2003 OK CR 11, ¶ 4, *n.* 13, 71 P.3d at 32, we modified OUJI-CR 2d. 4-68A for use in post-conviction mental retardation jury trials and said:

> . . . where jurors are not asked to sentence Lambert but solely to determine the issue of mental retardation, the trial court should start the instruction with Paragraph 2, beginning "You are advised that a person is 'mentally retarded'. . . ." *In the fourth paragraph, beginning "If you find . . . ", only the first and third sentences should be given, omitting the sentences concerning punishment. The fifth paragraph, defining preponderance of the evidence, should be read in its entirety.*

(emphasis added).

¶38 Accordingly, the instruction, OUJI-CR 2d. 4-68A, as modified by *Lambert,* should have been given in this case, and the correct instruction would have read as follows:

> If you find by a preponderance of the evidence that the answer to each of these questions is yes, then you must find that the Defendant is mentally retarded and so indicate on your verdict form.
>
> If you find that the answer to any of these questions is no, then you must find that the Defendant is not mentally retarded and so indicate on your verdict form.

¶39 Preponderance of the evidence means more probable than not. Instruction Number 4 focused *only* on finding "that the Defendant is not mentally retarded" and mentioned nothing about the possibility of finding the defendant mentally retarded. The language improperly and unfairly encouraged a jury verdict of not mentally

retarded. Further, the definitional instruction also did not define the burden of proof in the terms adopted by this Court. Instruction Number 3, entitled "Burden of Proof," was given to the jury. This instruction is unnecessarily complicated and does not use the "preponderance of the evidence" language adopted by this Court in *Murphy* and *Lambert*. In pertinent part, the instruction states:

> When I say that a party has a burden of proof on any proposition by the greater weight of the evidence, or use the expression "if you find", or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true. The greater weight of the evidence does not mean the greater number of witnesses testifying to a fact, but means what seems to you more convincing and more probably true.
>
> In deciding whether a party has met the burden of proof, you are to take into account all the evidence, whether offered by that party or any other party.

Instruction Number 3.

¶40 Throughout the trial the parties and the trial court discussed the burden of proof by a preponderance of the evidence. While the jury might have understood Instruction Number 3 to mean the same thing, it was error for the trial court not to give the uniform jury instruction, as modified in *Lambert*. We recognize Instruction Number 3 was modified from a Uniform Civil Jury Instruction. While this instruction, or a modified version of it, may be appropriate in civil trials, it is not the instruction approved for use in criminal, capital mental retardation

trials. We recognize Pickens's counsel did not object to these portions of the jury instructions. Still, we find plain error occurred when the trial court did not give the uniform jury instruction correctly defining mental retardation and correctly instructing the jury, as modified in *Lambert*. The jury, operating under the guidance of these incorrect instructions, returned a specious verdict.

¶41 The record of proceedings in this case supports Petitioner's claim that he proved, by a preponderance of the evidence, he is mentally retarded. We cannot be sure the jury instruction did not inappropriately tip the balance in favor of a finding of not mentally retarded. However, even under appropriate instruction, we believe no rational trier of fact could have found Pickens is not mentally retarded and remanding for a new jury trial on mental retardation would be a waste of time and resources.

¶42 Accordingly, because we find Pickens proved, by a preponderance of the evidence, that he is mentally retarded, we hereby order his death sentence vacated and modify his sentence to life imprisonment without the possibility of parole.

DECISION

¶43 The jury's verdict on mental retardation in Creek County District Court, Case No. CF 1990-66, is ***REVERSED***. The sentence of death is hereby ***VACATED*** and ***MODIFIED*** to life imprisonment without the possibility of parole. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY:	**C. JOHNSON, J.**
CHAPEL, P.J.:	CONCURS
LUMPKIN, V.P.J.	DISSENTS:
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS IN PART/DISSENTS IN PART

PB

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

¶1 I vigorously dissent to the Court's troubling decision, which vacates Appellant's death sentence and modifies that sentence to life imprisonment without

parole. The Court's Opinion represents both a miscarriage of justice and an abuse of judicial power.

¶2 In *Myers v. State,* 2005 OK CR 22, ___ P.3d ___, this Court set forth the standard of review to be used on appeal when a defendant challenges the sufficiency of the evidence following a jury finding that he or she is not mentally retarded. That is, "[w]hen the defendant challenges the sufficiency of the evidence following a jury finding that he is not mentally retarded, this Court will review the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion." *Myers,* 2005 OK CR 22, ¶ 7, ___ P.3d at ___.

¶3 But now, mere weeks after *Myers* was handed down, the Court has misapplied (or sidestepped) that standard, not once, not twice, but three times! *See Lambert v. State,* 2005 OK CR ___, ___ P.3d ___ and *Salazar v. State,* 2005 OK CR ___, ___ P.3d ___. Read together with these other decisions, today's opinion makes it clear that *Myers* has already been disregarded, thus impliedly overruled, and that the Court will substitute itself in as the trier of fact when mental retardation is raised as a defense to capital punishment. That is, the Court will use *de novo* review in appeals from jury decisions on mental retardation rather than the objective rule of appellate review established in *Myers,* for no other conclusion can be reached upon reviewing the procedural history and record in this case.

¶4 Petitioner has presented his mental retardation claim to many jurors and courts, but until today none of them have found this claim worthy of relief from the death sentence.

¶5 The first instance was when Petitioner was tried for first-degree murder and sentenced to death in a nearly identical case, Tulsa County Case No. CF-90-717.[1] There, Petitioner had raised his mental deficiencies as mitigation for the jury to consider (his expert testified he was borderline mentally retarded with an IQ of 77,[2] well above the 70 threshold that allows one to be considered mentally retarded). Nevertheless, a jury of twelve deliberated the matters presented in aggravation and mitigation and returned a death sentence.

¶6 On appeal, this Court[3] affirmed that conviction and sentence. *See Pickens v. State,* 1993 OK CR 15, 850 P.2d 328. In so doing, the Court rejected Petitioner's claim that the instructions had not allowed his jury to properly consider his "educably mentally handicapped" claim. Instead, the Court found the jury had been allowed to give full consideration of all mitigating evidence presented. On habeas review, however, the Tenth Circuit reversed on other grounds, finding a videotaped confession had been improperly admitted,[4] an error that was not harmless beyond a reasonable doubt. *Pickens v. Gibson,* 206 F.3d 988, 997 (10th Cir. 2000). Petitioner subsequently entered into a deal for the sentence of life imprisonment without the possibility of parole.

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[1] That case also involved a convenience store robbery and brutal murder, crimes that took place only four days after the crimes in the instant case.

[2] *See Pickens v. Gibson,* 206 F.3d 988, 997 (10th Cir. 2000).

[3] That decision included two members who today find Petitioner is mentally retarded.

[4] In that videotaped confession, Petitioner confessed to the crimes in this case.

¶7 In his first Creek County trial – concerning the crimes for which he is now on death row – Petitioner also raised the issue of mental retardation. His expert testified concerning Petitioner's level of intelligence and his chronic PCP use that had resulted in brain damage and "changed his attachment to reality." The jury instructions listed Petitioner's "mental age" as a mitigating circumstance, but after deliberating the jury still returned a death sentence. This Court later reversed that sentence on other grounds and remanded the case for a new trial. *Pickens v. State,* 1994 OK CR 74, 885 P.2d 678.

¶8 On retrial, Petitioner again raised the issue of mental retardation as part of his defense, and he received another instruction listing mental retardation as a mitigating circumstance. But jurors once again found the aggravating evidence outweighed the mitigating evidence and sentenced Petitioner to death. On appeal, this Court affirmed. *Pickens v. State,* 2001 OK CR 3, 19 P.3d 866, *cert. denied,* 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 842 (2002).

¶9 Thereafter, following *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *Murphy v. State,* 2002 OK CR 32, 54 P.3d 556, we granted Petitioner post-conviction relief on his mental retardation claim, remanding his case to Creek County for a jury trial on that specific issue. Petitioner was thus able to present his claim to jurors who were focused on the question at hand, i.e., whether Petitioner's mental retardation claim had substance and rendered him constitutionally ineligible for the death penalty. But once again, Petitioner could not convince a single juror that his level of intelligence provided a basis for relief from the death sentence imposed.

¶10 Petitioner has thus presented his mental retardation claim to four separate juries comprised of forty-eight Oklahomans, and it speaks volumes that none of them have granted him any form of relief. Additionally, the District Court, this Court, and the United States Supreme Court have declined to grant relief on several occasions.

¶11 That's why it is so disturbing to read the Court's opinion today, when it disingenuously states: "[w]e review the evidence in a light most favorable to the prevailing party to determine if any rational trier of fact could have reached the same conclusion".[5] For the Court does nothing of the sort. Indeed, the Opinion spends some fourteen pages reviewing the record *de novo* or, more often than not, in a light most favorable to Pickens![6]

¶12 Thus, rather than reviewing the evidence in a light most favorable to the prevailing party (the State), as is proper, the Court's opinion takes that State-favoring evidence and attempt to explain it all away. Under a *de novo* standard, some of the Court's discussions in this regard might be legitimate, but under the *Myers* standard

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[5] According to Webster's dictionary, a "rational trier of fact" would mean a juror who has the ability to reason. I see nothing in the record to indicate the jurors in question here were even more mentally retarded than Appellant claims to be.

[6] This isn't rocket science. The standard of review is identical to that used by this court for years when reviewing the sufficiency of the evidence, the standard adopted by the U.S. Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). And it doesn't become confused by the fact that the defendant rather than the State had the original burden of proof on the issue in question. Indeed, the fact that the burden of proof is switched from the State to a criminal defendant actually renders Appellant's claims even less compelling.

those discussions represent nothing more than rationalizations for personal opinions.[7]

¶13 The opinion thus acknowledges many points that should have weighed – and in the jury's mind clearly did weigh – in the State's favor: Petitioner scored in the borderline to low intelligence range on tests administered in school; he graduated from high school; he functioned as high as an eighth grade level in math; he could "talk, carry on conversation and print"; he had IQ scores ranging from 70 (which barely even qualifies him to be considered mentally retarded) to as high as 79; his latest test showed an IQ of 76; he made mostly A's and B's in school, including both educably mentally handicapped classes and regular classes; his developmental age on the Bender Visual Motor Gestalt Test was within average limits; Dr. Logan found he presently functioned in the borderline range of intelligence; he showed signs of marked improvement in literacy and math when taught by Ms. Brannon; there was no written documentation that Appellant was determined to be mentally retarded in school; his class rank was listed on his high school transcript as 125 out of 328; he could fill out medical services forms and write letters; some of his letters used advanced words and language; the trial judge found Petitioner had the ability to articulate numerous arcane and complicated ideas, memories, and feelings; Petitioner began using PCP and smoking marijuana at an early age; he continued abusing

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[7] I do not doubt my colleagues are sincere when they take the position that Pickens is mentally retarded. The evidence on this point was unquestionably conflicting, and reasonable persons could disagree on that point. The question, however, is whether the jury's verdict is supportable under the law and facts. Here it clearly is.

drugs while in prison; substance abuse can affect IQ tests; some witnesses testified that Petitioner could communicate normally; Petitioner was able to plan out detailed lies; one witness spoke with Petitioner and found him to be intelligent; he dressed neatly; Petitioner refused to take standardized adaptive functioning tests; and Petitioner's testing was influence by a poor home environment with drugs and violence.

¶14 Today's opinion concedes these evidentiary points, before explaining them away. But there was additional evidence. Petitioner had a 2.7 GPA in school. Prison officials commended him for hard work and dedication in completing assigned tasks. He was able to communicate his medical needs and symptoms to doctors. He wrote letters with legal terms like habeas corpus, notarization, motions, continuances, pro se, ineffectiveness, unprofessional conduct, and record. He had average visual motor integration and neat handwriting. A former sheriff and community-sentencing employee (with a mentally retarded sister) interviewed Petitioner and formed the opinion that he was not mentally retarded. Petitioner was employed and drove an automobile. He could adjust his lies when given additional facts. He had good memory and could carry on a good conversation. One expert testified, based upon Petitioner's 1976 I.Q. test, that there is a 95% chance that Petitioner's I.Q falls between 73 and 85, which is in the borderline intelligence range.

¶15 Of course, there was also a lot of evidence introduced by Petitioner to show he is mentally retarded, some of which could be countered with the type of justifications presented in today's opinion. But the point is this: Petitioner's case is a close call under the facts and evidence, and there is evidence supporting either point of

view. That is why we have juries, to listen to the evidence, review the facts, and reach what is often a very difficult decision.

¶16 Twelve rational jurors reviewed the evidence in this case and did in fact reach the conclusion that Petitioner is not mentally retarded. Unless we can say no rational juror could have possibly reached that decision upon viewing the evidence in a light most favorable to the State, we have a legal duty to affirm. And here, there was ample evidence to support the jury's verdict. Indeed, Petitioner's I.Q. scores, only one of which put him in the mild mentally retarded range, were alone sufficient to support the jury's verdict.

¶17 In essence, today's ruling takes the position that the opinion of three judges reviewing a cold record on the issue of mental retardation is "rational," while simultaneously finding the unanimous opinion of twelve qualified jurors who viewed the evidence first hand was irrational. We need not look far to understand that something is terribly wrong with that idea, for Article 2, Section 19 of Oklahoma's Constitution states that "[t]he right of trial by jury shall be and remain inviolate. . . ." And according to our well-established case law, the jury is the exclusive judge of the weight and credibility of the evidence. *See Smith v. State,* 1996 OK CR 50, ¶ 23, 932 P.2d 521, 530; *Robedeaux v. State,* 1993 OK CR 57, ¶ 43, 866 P.2d 417, 429.

¶18 I agree that the instructional errors that occurred in this case necessitate relief. But that relief is to reverse this case and remand it for a new trial, not decide the fact question as a matter of law.

¶19 The crucial point is this: the evidence of mental retardation was sharply conflicting. As such, the jury's decision must stand. This Court has no business substituting what "we would do" for what twelve competent jurors did. As we said in *Martinez v. State,* 1999 OK CR 33, ¶ 36, 984 P.2d 813, 824:

> . . . a fundamental premise of our criminal trial system is that "the jury is the lie detector." Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."

984 P.2d at 824 (internal citations omitted).

¶20 What is occurring in this case is reminiscent of Alexander Hamilton's admonition in *The Federalist,* No. 78, when he wrote, "It can be of no weight to say, that the Courts on the pretense of a repugnancy, may substitute their own pleasure to the Constitutional intentions of the legislature", or in this case the duly valid verdict of a jury of Oklahoma citizens.

¶21 According to *Myers,* "We will not disturb the jury verdict where there is any competent evidence reasonably tending to support it." 2005 OK CR 22, ¶ 7, ___ P.3d ___. If only that were true.

LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:

¶1 I concur in reversing the verdict in this case. However, I dissent to modifying the sentence. I would reverse and remand for a new trial on the issue of mental retardation.

IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. CF-1990-66**
DARRIN LYNN PICKENS	)	
	)	
Defendant.	)	

ORDER

(Filed Apr. 8, 2004)

NOW on this 31 day of March, 2004, this cause comes on for hearing on the defendant's Application For Review By Trial Judge Of Jury Verdict and for the Court to enter its Finding of Facts and Conclusions of Law pursuant to *Salazar v. State,* 84 P.3d 764, (Okl.Cr 2004) and *Martinez v. State,* 80 P.3d 142 (Okl.Cr 2003). The State has appeared throughout this proceeding by Assistant District Attorneys Michael S. Loeffler and Don I. Nelson and defendant by Vicki Ruth Adams Werneke and Wyndi Thomas Hobbs.

The Court finds that a jury was empanelled herein on February 17, 2003 pursuant to the Order of the Court of Criminal Appeals in *Pickens v. State,* 74 P.3d 601 (Okl.Cr 2003). The jury heard evidence in order to make a determination on defendant's claim of mental retardation, pursuant to *Murphy v. State,* 54 P.3d 556 (Okl.Cr 2002). To accomplish same the Court utilized the procedure set forth in *Lambert v. State,* 71 P.3d 30 (Okl.Cr 2003).

The Court further finds that the jury returned its verdict on February 20, 2004 and found defendant "Not Mentally Retarded".

The Court further finds that defendant did not raise sufficient evidence at the jury trial on the issue of mental retardation to prove that Defendant is mentally retarded by a preponderance of the evidence as required in *Lambert,* supra.

The Court, after careful review of the testimony and evidence adduced at the jury trial on the issue of mental retardation finds that the following orders should issue, to-wit:

IT IS THEREFORE ORDERED ADJUDGED AND DECREED by the Court that Defendant/Petitioner, Darrin Lynn Pickens did not meet his burden of proof at the jury trial on the issue of mental retardation in accordance with the definition set forth in *Murphy,* supra, and accordingly defendant is not mentally retarded.

IT IS FURTHER ORDERED by the Court that all further proceedings shall be pursuant to the Order of the Court of Criminal Appeals and the relief sought by defendant's Application For Review By Trial Judge of Jury Verdict is hereby denied.

Findings of Fact/Conclusions of Law

1. That defendant scored 71 at age 7 on a IQ test administered by Sand Springs school psychologist in 1973. The test examiner noted that defendant's score was hurt by the test which was 'slanted' towards white students. Based on this test score and review by a school committee, defendant

was placed in special education where he remained through high school.

2. That defendant scored 79 and 70 (the only test which even equaled the *Murphy* cutoff of 70) on subsequent IQ tests in 1975 and 1980, respectively, while a student at Sand Springs Schools.

3. That none of the aforesaid IQ scores meet the *Murphy* definition of a "contemporary IQ test" in that they were administered after the capital crime was committed. However, these tests were allowed into evidence because they ostensibly could be "understood by contemporary standards" as set forth in *Murphy*.

4. That of greater persuasiveness to the Court was the IQ test administered by the Department of Corrections in 1990 after defendant's crime was committed. At that time, defendant scored 77 or 76 depending upon who scored it. In addition the average of defendant's IQ scores is 74, which is well above the *Murphy* cutoff of 70.

5. That no standardized adaptive functioning tests for defendant were introduced. There was some anecdotal testimony from defendant's special education teachers and defendant's expert witness who reported defendant had bad hygiene and the like (e.g. had to be reminded to bathe, brush teeth, put shoes on right feet etc.). Both teachers opined that defendant was mentally retarded. However, this testimony was hardly determinative and was countered in large part by the State through testimony of Frank Smith and Larry Fugate along with written Department of Corrections' evidence dealing with defendant's apparently adequate adaptive functioning while in custody.

6. That throughout this proceeding, defendant refused all IQ and adaptive functioning tests both from the defendant's psychologist, Dr. Cunningham, and the State's psychologist, Dr. Call. This, despite defendant's demonstrated ability to request medical and dental services in Department of Corrections when needed. Both experts testified that this contemporary testing was needed and Dr. Call testified that without same that there was insufficient documentation (testing) to determine that defendant was mentally retarded under *Murphy.* This refusal to test also prevented either side from testing defendant for malingering.

7. That Dr. Cunningham testified that defendant was mentally retarded, but seemed to utilize a definition of mentally retarded that at times vastly distorted and at times patently ignored the definition of mentally retarded set forth in *Murphy,* supra. This was most apparent in regard to his attempts to deflate defendant's IQ scores using the *'Flynn Effect' and other methods.* All of these inconsistencies were highlighted in cross-examination and persuasively refuted by Dr. Call. Dr. Cunningham admitted reluctantly on cross-examination that "in the best of all worlds" that defendant needed further testing of IQ and adaptive functioning to determine if he was mentally retarded.

8. That defendant has signed certain pleadings and has handwritten various pro se motions and letters to the Court and Court Clerk during the 1990's. These letters were relatively and consistently courteous, clear, concise and articulate. Defendant also was able to articulate numerous arcane and complicated ideas, memories and feelings from the short and long term past all of

which tends to support higher intellectual and adaptive functioning than that alleged by defendant.

9. That defendant by all accounts and by his own admission to Dr. Cunningham was a heavy drug user from age 14 onward (marijuana) and later in high school was a heavy user of both marijuana and PCP (angel dust). Dr. Cunningham admitted that PCP is a neurotoxin which causes brain damage. This drug use has continued while defendant has been in prison and later on death row per Department of Corrections disciplinary records. Dr. Logan admitted and common sense dictates that substance abuse can negatively affect and distort IQ scores.

10. That evidence introduced by both sides regarding defendant's school performance was inconsistent. Although in special education classes from age 7 onward, defendant took several mainstream classes in high school (Physical Education/Work Study/Math and possibly others) and made average grades in such classes. Although an Assistant School Superintendent, Dr. Smith, testified special education students were not ranked for graduation standing, defendant graduated in the top 40% of his class with a 2.7 GPA. No witness could adequately explain these inconsistencies.

11. That the clear impression left by testimony regarding defendant's intelligence at school, in Department of Corrections education programs and on low verbal but relatively high performance levels on IQ tests is that defendant indeed functions poorly at language skills, but is quite able to master everyday performance skills. As Dr. Logan and Dr. Smith testified there are a number of different gifts/kinds of intelligence and

Murphy dictates IQ scores are but one factor in this regard.

12. That there was almost no reliable testimony regarding defendant's adaptive functioning insofar as he has been incarcerated for all but approximately one year since his 18th birthday. Defendant's refusal to take any standardized adaptive functioning tests was crucial because the alleged instances of deficient adaptive functioning provided by defendant were entirely anecdotal and incidental. This anecdotal evidence of poor adaptive functioning is more likely explained by the poor environment in which defendant functioned as a child (drug use/sales, violence, gambling etc.), as evidenced by the fact that Mr. Jones, defendant's teacher would not even go inside defendant's house.z

13. That defendant is not mentally retarded, pursuant to the *Murphy,* supra, definition and that defendant wholly failed to meet its burden of proof in this regard. Specifically defendant did not adequately prove low intellectual functioning, that said low functioning evidenced itself before age 18 and that defendant was deficient in any of the adaptive functioning areas set forth in *Murphy.*

14. That the claim by defendant in its post trial Application that "The jury may have been influenced improperly by media coverage surrounding the case." is wholly conjecture and unsupported by any evidence whatsoever. The jury was properly instructed to ignore newspaper or other accounts of the trial and that no instances of juror misconduct have been reported to or observed by the Court.

IT IS SO ORDERED!

/s/ Donald D. Thompson
DONALD D. THOMPSON
JUDGE OF THE DISTRICT COURT

2005 OK CR 24
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MAXIMO LEE SALAZAR, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.	)))))))	**FOR PUBLICATION** Case No. PCD 2002-984

OPINION GRANTING POST-CONVICTION RELIEF AFTER REMAND FOR JURY DETERMINATION ON ISSUE OF MENTAL RETARDATION

(Filed Dec. 7, 2005)

¶1 Petitioner, Maximo Lee Salazar, was convicted by a jury in Comanche County District Court, Case No. CRF 1987-460, of First Degree Malice Aforethought Murder, in violation of 21 O.S.Supp.1982, § 701.7 (Count 1) and Burglary in the First Degree, in violation of 21 O.S.1981, § 1431 (Count 2). The jury found three (3) aggravating circumstances existed[1] and set punishment at death for the murder and ten (10) years imprisonment for the burglary. The trial court sentenced Petitioner accordingly. On direct appeal, we affirmed Petitioner's convictions for

[1] [1] the defendant knowingly created a great risk of death to more than one person; [2] the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and [3] the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, § 701.12(2), (5) and (7) respectively.

murder and burglary, but vacated the death sentence and remanded the case for resentencing. *Salazar v. State,* 1993 OK CR 21, 852 P.2d 729. A new sentencing proceeding was held before the Honorable Allen McCall, District Judge, on November 14-17, 1994, and the jury again returned a sentence of death. The jury found one (1) aggravating circumstance existed.[2] Petitioner appealed, and this Court again reversed and remanded the case for a second resentencing hearing. *Salazar v. State,* 1996 OK CR 25, 919 P.2d 1120.

¶2 A third sentencing hearing was conducted before the Honorable Allen McCall, District Judge, on October 28-31, 1996. The jury again returned a sentence of death, finding the existence of two (2) aggravating circumstances – that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and that Petitioner posed a continuing threat to society. On appeal, we affirmed Petitioner's death sentence. *Salazar v. State,* 1998 OK CR 70, 973 P.2d 315. Petitioner's Original Application for Post-Conviction Relief and Verified Motion for Evidentiary Hearing on Post-Conviction Claims were denied. See Order Denying Application for Post-Conviction Relief and Verified Motion for Evidentiary Hearing, *Salazar v. State,* PC 1998-663 (Okl.Cr. August 20, 1999) (not for publication). The United States Supreme Court denied certiorari in *Salazar v. Oklahoma,* 525 U.S. 895, 120 S.Ct. 226, 145 L.Ed.2d 190 (1999).

¶3 On November 4, 2002, Petitioner filed a Successor Application for Post-Conviction Relief, pursuant to 22

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[2] The defendant knowingly created a great risk of death to more than one person. 21 O.S.1981, § 701.12(2).

O.S.2001, § 1089, and a Motion for Evidentiary Hearing, filed pursuant to Rule 9.7(D), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2002). We remanded the matter to Comanche County for an evidentiary hearing on Petitioner's claim of mental retardation, as raised in Proposition One of his Successor Application for Post-Conviction Relief. *See* Order Granting Motion for Evidentiary Hearing on Proposition One of Successor Application for Post-Conviction Relief, *Salazar v. State,* PCD 2002-984 (Okl.Cr. December 12, 2002) (not for publication). After the evidentiary hearing, we granted post-conviction relief, in part, and remanded this case to Comanche County District Court for a jury determination on Petitioner's claim of mental retardation. *See* Order Denying Post-Conviction Relief on Proposition Two; Order Granting Post-Conviction Relief on Proposition One and Remanding to the District Court of Comanche County for a Jury Determination on the Issue of Mental Retardation, *Salazar v. State,* PCD 2002-984 (Okl.Cr. June 11, 2003) (not for publication).

¶4 Pursuant to this Court's June 11th, 2003 Order, the Honorable Allen McCall, District Judge of Comanche County, empanelled a jury and trial on Petitioner's claim of mental retardation was held September 2nd, 2003 through September 5th, 2003. At the conclusion of the hearing, the jury found Petitioner was not mentally retarded. Petitioner, through counsel, then filed a Motion for New Trial, Judgment Notwithstanding the Verdict and Post-Trial Review in the District Court. The District Court denied these motions after a hearing on October 7, 2003. The trial court filed its Findings of Fact and Conclusions of Law in this Court on November 3, 2003.

¶5 Counsel for Petitioner filed a new Petition in Error and sought clarification of the procedure to appeal from the jury's verdict and from the trial court's Findings of Fact and Conclusions of Law. On January 15, 2004, counsel for Petitioner filed the Brief of Petitioner with Combined Motion for New Trial Based on Newly Discovered Evidence. A Motion to Supplement the Record, with attached supporting affidavits, was also tendered for filing on that date. In response to the request for clarification and in consideration of other pending cases involving post-conviction mental retardation claims, we published uniform procedures to be followed in capital post-conviction mental retardation cases. *Salazar v. State,* 2004 OK CR 4, 84 P.3d 764. In that Order, we advised Petitioner to file a new brief in compliance with the procedures and rules set forth therein and also denied Petitioner's Motion for New Trial on Newly Discovered Evidence.[3] *Salazar,* 2004 OK CR 4, ¶¶3, 9, *f.* 2, 4, 84 P.3d 764, *f.* 2, 4. Thereafter, Petitioner's Brief was filed on February 18, 2004. Respondent's Supplemental Brief Following Jury Determination was filed on February 18, 2004.

¶6 Petitioner raises six propositions of error arising from the jury's determination that he is not mentally retarded:

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[3] On January 15, 2004, Petitioner filed his "Brief of Petitioner with Combined Motion for New Trial Based on Newly Discovered Evidence." Petitioner raised issues pertaining to the jury hearing/determination of mental retardation, including an allegation of newly discovered evidence requiring remand for a new trial or an evidentiary hearing. Because the combined Brief/Motion for New Trial was not in compliance with the rules and procedures set forth in the *Salazar* clarification order, we notified Petitioner we would not consider those pleadings and directed Petitioner to file a Brief in accordance with the procedures set forth therein. *Salazar,* 2004 OK CR 4, *f.* 4, 84 P.3d 764, *f.* 4.

1. The district court erred in the admission of "other crimes" evidence having little or no relevance to the limited question of mental retardation;

2. Deliberate, non-responsive comment on Mr. Salazar's right to remain silent by the State's expert witness violated the privilege against self-incrimination;

3. The trial court's instruction that mental retardation must be "present and known" before age 18 violated *Atkins v. Virginia*;

4. The trial court erred by denying Mr. Salazar's request to submit non-unanimous verdict forms to the jury;

5. The jury's verdict found Mr. Salazar "not mentally retarded" contrary to the clear weight of the evidence properly admitted at trial; and,

6. Newly discovered evidence about the prosecution expert's use of a non-standardized "malingering test," and his misleading testimony about his own testing and that of a defense expert, requires remand for a new trial or modification.

¶7 In *Lambert v. State,* 2003 OK CR 11, 71 P.3d 30, we said an

> *[A]tkins* claim of mental retardation must be resolved pursuant to the definition of mental retardation as set forth in *Murphy v. State.* For capital purposes, a mentally retarded person is one with significantly limited ability to intellectually and adaptively function in enumerated areas, who has at least one IQ test score of 70 or below, and in whom the retardation manifested itself below age 18. . . .

(footnotes omitted) *Id.*, 2003 OK CR 11, ¶2, 71 P.3d at 31. The decision to be made on remand "is solely devoted to the question" of mental retardation. *Id.*, 2003 OK CR 11, ¶3, 71 P.3d at 31. Petitioner's "criminal conviction and death sentence are not relevant to this issue" and

> [t]he jury should not hear evidence of the crimes for which [Lambert] was convicted, unless the particular facts of the case are relevant to the issue of mental retardation. Any such evidence should be narrowly confined to that issue. . . . The only issue is whether [Lambert] meets the *Murphy* definition for mental retardation.

Id.

¶8 In Proposition Five, Petitioner claims the jury's verdict that he is not mentally retarded is contrary to the clear weight of the admissible evidence. We consider this claim with the claim raised in Proposition Six – that newly discovered evidence about the prosecution expert's use of a non-standardized "malingering test," and his misleading testimony about his own testing and that of a defense expert, requires remand for a new trial or modification.

¶9 At the jury determination hearing, Petitioner presented testimony from two of Petitioner's school teachers who recognized his mental retardation before the age of eighteen.[4] He presented evidence of intelligence testing

[4] Patt Nazari, a special education teacher in Ardmore, Oklahoma, taught Petitioner in the Ardmore Development Center. She testified he scored between fifty (50) and seventy (70) on an IQ test to be placed in the learning disabled center. Nazari testified she considered Petitioner mentally retarded. Allene Gilliam, also an Ardmore teacher of learning disabled students, testified Petitioner had "significant subaverage

(Continued on following page)

reflecting at least one score below seventy (70).[5] He presented testimony showing significant deficits in certain areas of adaptive functioning.[6] The State presented evidence to refute these claims and much of the State's case consisted of testimony concerning the circumstances surrounding crimes committed by Petitioner, although not the crime for which Petitioner was sentenced to death.[7]

¶10 The State also presented two expert witnesses to dispute Petitioner's intelligence testing scores and evidence. One of these witnesses was Dr. John Call, and the record shows Dr. Call was the State's most persuasive and most pivotal witness. Dr. Call disagreed with Petitioner's forensic psychological witnesses who testified that Petitioner was mentally retarded and Dr. Call testified that each of the IQ tests reflecting a score lower than seventy was

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intellectual functioning" and said she considered him to be mentally retarded.

[5] Patt Nazari testified he scored between fifty (50) and seventy (70). Dr. Samual Sherman testified Petitioner scored a sixty-five (65) on the verbal portion of the Wechsler Adult Intelligence Test and was in the mildly mentally retarded range. Dr. Sherman testified his Global Assessment Score was thirty-eight (38) which is "a fairly serious low level of functioning." Dr. Randall Price noted prior intelligence tests performed by Drs. Close and Kaufman – both which reflected scores between sixty-seven (67) and eighty-three (83). The last IQ test was given to Petitioner in April 2003 by Dr. John Call and Petitioner scored a sixty-eight (68).

[6] Dr. Price testified Petitioner performed poorly on the Independent Living Scale, test of adaptive abilities. Petitioner had significant deficits and scored below average. Dr. Price also reviewed personal histories reflecting Petitioner had poor personal hygiene which suggested an adaptive functioning deficit in the area of personal care and hygiene and independent life skills.

[7] The State presented eleven witnesses who testified about Petitioner's commission of crimes, about his behavior during the investigation of his crimes, and about his behavior while incarcerated.

invalid for one reason or another. His testimony was crucial to the State's position, as it was he who discredited and contradicted each of Petitioner's witnesses.

¶11 Among other things, Dr. Call testified that Petitioner was malingering. He believed Petitioner was malingering when he, Dr. Call, administered the Wechsler Adult Intelligence Scale, 3rd Edition, and obtained a full scale IQ score of 68. Dr. Call administered the Test of Memory Malingering (TOMM) and a Forced Choice Symptom Validity Test. He described one of the two "malingering" tests he administered as one in which he showed Petitioner twenty-five common words and asked him to memorize those words. Then he gave Petitioner another list of twenty-five word pairs and asked Petitioner to identify the words he had been asked to memorize. Dr. Call testified:

> If you had never seen the words, by chance, you would get fifty percent – approximately fifty percent correct by just guessing . . . The odds, the statistical odds that you would get no words correct are astronomical, so astronomical as to be unlikely, highly improbable occurrence.
>
> On that particular technique, Mr. Salazar obtained six words out of twenty-five correct, which is a probability of point zero zero two, two chances out of a hundred. *In science we would say that's a statistically significant event and that suggests malingering.*

(emphasis added). Dr. Call went on to talk about the "norms" for psychological testing and testified the malingering tests he administered to Petitioner showed he was "trying to look mentally retarded when he is not."

¶12 Dr. Call testified that all the standardized test results obtained by the psychologists who testified for Petitioner were invalid or unreliable. With regard to one of Petitioner's experts, Dr. Call suggested it was "unethical to administer tests" that have norms Petitioner did not fall within. Dr. Call also refuted Dr. Randall Price's testing, in part, by claiming that Dr. Price utilized "a non-standardized malingering test" and that he (Dr. Call) would *not* have administered a non-standardized test. Dr. Call stated "[I]t's not a norm – it's not a norm with a board certified forensic psychologist" to administer such a test. He also said it was unethical not to report the results of the test. Dr. Call testified he had never done that and believed that made the rest of Dr. Price's work suspect.

¶13 The above only partially illustrates the extent to which the State relied upon Dr. Call's expert testimony as its primary witness to refute and rebut Petitioner's evidence of mental retardation. Review of Respondent's Supplemental Brief shows Respondent relies upon Dr. Call's testimony almost exclusively to refute Petitioner's claim that the jury's verdict was contrary to the clear weight of the evidence presented at trial. It is obvious from review of Respondent's brief alone that Dr. Call's testimony was vitally important to the State's case, and it is partly for that reason that the allegations raised in Proposition Six and in the Affidavits supporting the Motion to Supplement the Record caused this Court concern.

¶14 In Proposition Six and in the Motion to Supplement the Record and Affidavits filed in support thereof, Petitioner claims that newly discovered evidence relating to Dr. Call's expert witness testimony requires remand for a new jury determination or modification of sentence. Petitioner claims Dr. Call relied upon a non-standardized

scientific test which he created, and its results, to bolster his testimony refuting Petitioner's experts' findings that Petitioner was/is mentally retarded. Counsel for Petitioner argues this is the type of "non standardized testing" which Dr. Call pointedly attacked Petitioner's key expert witness for utilizing and for which he questioned that expert's ethics and findings.

¶15 Counsel for Petitioner admits that Dr. Call's testing procedure, specifically his administration of a Forced Choice Symptom Validity Test, was not specifically challenged by counsel in Petitioner's mental retardation trial. Counsel for Petitioner states at *f.* 2 of Petitioner's Brief that "[a]t the time of cross-examination, counsel believed that the other 'Forced Choice Symptom Validity Test' mentioned in Call's report was another published, standardized measure of alleged malingering. Counsel therefore avoided questioning which could give Dr. Call a further chance to expand on his opinion about malingering based on its results." Counsel for Petitioner also notes "Dr. Call's forensic credentials and his membership in the Oklahoma Bar entitled him to an initial presumption that his testimony about basic forensic facts would be accurate and above board."

¶16 The Affidavits attached to the Motion to Supplement reflect that this evidence was not discovered by Petitioner's counsel until after the jury trial on mental retardation. However, counsel for Petitioner admits that to the extent this evidence was discoverable prior to Petitioner's mental retardation trial, Petitioner's counsel was ineffective for failing to discover and utilize it.

¶17 In consideration of the claim of newly discovered evidence and Petitioner's claim that his counsel was

ineffective for failing to discover the evidence, we remanded this matter to the District Court for an evidentiary hearing. *See* Order Remanding to the District Court of Comanche County for an Evidentiary Hearing, *Salazar v. State,* PCD 2002-984 (Okl.Cr. June 4, 2004) (not for publication). By that Order, we noted this Court's concern "with the availability of the evidence prior to Petitioner's mental retardation hearing, the effect the evidence would have had on the State's expert's testimony and the mental retardation determination, whether the failure to discover and utilize this evidence was trial strategy, and whether the evidence would have impacted the verdict rendered."

¶18 An evidentiary hearing was conducted on June 29, 2004, before the Honorable Allen McCall, District Judge. Two witnesses testified – the attorney who represented Petitioner at the jury trial on mental retardation and Dr. John Call, the State's expert witness. Certain exhibits were admitted into evidence at the hearing, which included the Affidavits attached to the Motion to Supplement the Record, three juror questionnaires, Dr. Call's report and the Raw Data of Dr. Call. The trial court considered the testimony of the two witnesses, the exhibits of the parties, the transcript of Petitioner's mental retardation trial, and its review of the file.

¶19 Judge McCall filed Findings of Fact and Conclusion of Law in this Court on July 23, 2004. The transcript of the evidentiary hearing was filed in this Court on September 13, 2004. This Court will give the trial court's findings strong deference if supported by the record, but we shall determine the ultimate issue of whether trial counsel was ineffective or whether newly-discovered evidence warrants a new trial. *See e.g. Patterson v. State,* 2002 OK CR 18, ¶19, 45 P.3d 925, 930; *Glossip v. State,*

2001 OK CR 21, ¶20, 29 P.3d 597, 602; Rule 3.11(B)(3)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2004).

¶20 With regard to whether evidence of Dr. Call's use of a non-standardized test (which he created and named after his secretary to support his opinion that Petitioner was malingering and faking mental retardation) was available prior to Petitioner's mental retardation hearing, the trial court found:

> . . . while there appears to be some confusion over the naming of the test in question, the actual test and results were in possession of the defense well prior to Petitioner's mental retardation trial. This does not appear to be a situation of "newly discovered evidence."

We agree with this finding. Evidence of Dr. Call's use of the "Blackwell Memory Test" was available to counsel prior to the mental retardation jury trial; the raw data for the test was turned over by the State in discovery.[8]

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[8] Petitioner's counsel from the mental retardation jury trial admitted the State turned over Dr. Call's raw data in discovery and this data contained Dr. Call's "Blackwell Memory Test." Petitioner's counsel admitted he "could be charged with knowledge of the Blackwell Memory Test along in that time period," but stated he did not know what it was and did not know it was a malingering test. Further, Petitioner admits in a footnote in his Brief that "[a]t the time of cross-examination, counsel believed that the other 'Forced Choice Symptom Validity Test' mentioned in Call's report was another published, standardized measure of alleged malingering. Counsel therefore avoided questioning which could give Dr. Call a further chance to expand on his opinion about malingering based on its results." At the evidentiary hearing, counsel explained that he prepared to cross-examine the witness on the widely recognized Test of Memory Malingering (TOMM) but was only

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¶21 The trial court's second finding related to the effect this evidence would have had on the State's expert's testimony and the mental retardation determination. The trial court found:

> Dr. Call's testimony during the evidentiary hearing indicates that the test which was thought to be newly discovered evidence was in fact a malingering test which he had named after his secretary in an attempt to disguise from the test taker the nature of the test. While his delivery of this explanation was smug, his reason for using an "administrative pseudonym" for his version of the Forced Choice Symptom Validity Test (FCSVT) is acceptable and would have had little or no effect on his overall testimony (direct or cross).
>
> Given the totality of the evidence submitted to the jury during Petitioner's mental retardation trial, it is extremely unlikely that the confusion of this "administrative pseudonym" would have had any effect on the jury's mental retardation determination. As indicated previously, this was an outstanding jury, very attentive and fair minded to all witnesses and counsel. The evidentiary presentations by the State and Petitioner were excellent and it appeared to the Court that the instructions were understood and followed by the jury in arriving at the verdict. There exists in the record no reason to believe the mental retardation determination by the jury would have been different based on this "newly discovered evidence."

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generally familiar with forced choice symptom validity tests because there were so many.

While we agree with a portion of this finding, we cannot agree with the trial court's conclusion that the discovery of this evidence relating to Dr. Call's use of a non-standardized test, which he administered to Petitioner and named after his secretary, would have had little or no effect on his testimony. Review of the entire record, including the mental retardation trial and certain exhibits admitted at the evidentiary hearing, shows this evidence would have greatly affected Dr. Call's credibility as a witness and the statements he made which discredited Dr. Price and all of Petitioner's expert witnesses.

¶22 At the jury trial, Dr. Call prefaced his expert testimony by telling the jury he was a licensed attorney and he was board certified by the American Board of Professional Psychology and the American Board of Forensic Psychology. He stated "I'm the only one in Oklahoma and there's about two hundred in the world that are board certified forensic psychologists." Unlike the other expert witnesses who had testified in Petitioner's trial, Dr. Call held himself out as a "unique" expert suited to testify in this area. He stated there was not sufficient data to support Petitioner's claim of mental retardation.

¶23 Dr. Call admitted he administered the Wechsler Adult Intelligence Scale Third Edition and the Wide Range Achievement Test Third Edition and administered two malingering tests to determine if Petitioner was putting forth his best efforts. On those tests administered by Dr. Call, Petitioner obtained a full scale IQ score of sixty-eight (68). However, Dr. Call stated the malingering tests he administered showed Petitioner was not motivated "to perform at his capacity when I administered the test." Dr. Call went on to describe the two malingering tests he administered – one of those tests we now know was the

Blackwell Memory Test. On this test, Dr. Call said Petitioner's extremely low score suggested he was malingering. Dr. Call then testified that virtually every intelligence test administered to Petitioner by other mental health professionals and the scores obtained from them were invalid for various reasons.

¶24 At the mental retardation jury trial, Dr. Call discredited Dr. Cowardin's test results from the Kaufman Test of Education Achievement and from the Detroit Test of Learning Aptitude, stating these tests were "not appropriate" for a person Petitioner's age; Dr. Cowardin reported Petitioner achieved a sixty-nine (69) on the Kaufman Test, in the bottom two percent of the population, and that he scored in the range of a six (6) to eleven (11) year old on the Detroit Test. He concluded his testimony about Dr. Cowardin's results by testifying her methods were unethical.

¶25 At the mental retardation jury trial, Dr. Call discredited the test results reported by Dr. Sherman. Dr. Sherman's previous sworn testimony was read into the trial record. Dr. Sherman worked at Eastern State Hospital during the time Petitioner was sent there to attain competency to stand trial. Dr. Sherman administered the verbal portion of the Wechsler Adult Intelligence Test to Petitioner while he was at Eastern State Hospital, and Petitioner scored a sixty-five (65). Petitioner's Global Assessment Score was thirty-eight (38), which was a "fairly serious low level of functioning." Dr. Call discredited Dr. Sherman's test results as "invalid," because Dr. Sherman only administered half of the test; he did not administer the performance portion.

¶26 At the jury trial, Dr. Call also invalidated Dr. Randall Price's testing of Petitioner and his results. The following transpired at trial:

Mr. Schulte: Doctor, I'd like to go to Dr. Price. I believe you received his raw data . . .

. . .

What were your findings there, sir?

Dr. Call: Well, he was performing a neuropsychological screening and as part of the screening, he did administer a – it's a simple non-standardized malingering test.

Mr. Schulte: Why would a person do a non-standardized test, sir, on a case this important?

Dr. Call: *I don't know.*

Mr. Schulte: Is that the norm within the profession?

Dr. Call: *It's not a norm – it's not a norm with a board certified forensic psychologist.*

Mr. Schulte: Such as yourself?

Dr. Call: *Correct.*

Dr. Call criticized Dr. Price's use of this test and his failure to report the results as showing Petitioner was malingering. He testified that it would be unethical to perform a malingering test and not report the results; he testified it would make the rest of the person's work "suspect" to him. Dr. Call very effectively testified for the State that Dr. Price's findings and his opinion that Petitioner was mentally retarded should not be considered because his testing

was suspect and Dr. Call's tests showed Petitioner was malingering.

¶27 What the above colloquy shows is that Dr. Call effectively discredited Petitioner's experts by claiming they used improper testing procedures, by using tests not "normed" for a person like Petitioner, and by not properly reporting the results. Had Dr. Call not done the exact same things, there would be no problem.

¶28 The trial court, in its findings, stated Dr. Call's use of an "administrative pseudonym" for the Forced Choice Symptom Validity Test he administered to Petitioner was reasonable and its discovery would have had little or no effect on his testimony. We disagree. The evidence obtained after trial shows Dr. Call had himself made up and administered a non-standardized test to Petitioner and it was not administered pursuant to accepted scientific norms. Dr. Call's letter to the Assistant District Attorney, Petitioner's Exhibit 2, attempts to convince the reader that his test was accepted and reliable. However, Dr. Call's admissions at the evidentiary hearing show Dr. Call knew he relied on a non-standardized test, similar to those he had discredited at the jury trial, to convince the jury Petitioner was malingering. Further, the Affidavit of Dr. Rogers, Petitioner's Exhibit 3, shows it was, in fact, not administered according to accepted scientific norms. Had Petitioner's counsel realized the origins and basis of Dr. Call's "Blackwell Memory Test," he could have discredited Dr. Call's testing methods in the same way Dr. Call discredited Petitioner's experts.

¶29 In this second finding, the trial court also stated, in part "[I]t is extremely unlikely that the confusion of this 'administrative pseudonym' would have had any effect on the jury's mental retardation determination. . . . There exists in the record no reason to believe the mental retardation determination by the jury would have been different based on this 'newly discovered evidence.'" This finding is contradicted by the record.

¶30 The trial court admitted certain exhibits at the evidentiary hearing. After the mental retardation jury trial, Petitioner's counsel sent juror surveys to all twelve jurors; only three were returned. Petitioner's Exhibits 4A, 4B, and 4C are the three juror surveys which were returned and these three surveys were admitted at the evidentiary hearing. Although counsel for the State indicated the State had also obtained jury responses, the State did not offer those at the evidentiary hearing.

¶31 Review of Petitioner's Exhibits 4A, 4B and 4C shows three important things: all three jurors surveyed rated Dr. Call as the State's most favorable or "highly credible" witness; all three jurors surveyed rated "prosecution expert (Dr. Call)" as the most important testimony; and one of those jurors made the following statement: "The incomplete testing gave greater credibility to Dr. Call's testimony and complete testing." *See* Petitioner's Exhibits 4A, 4B and 4C. These responses constitute evidence in the record which suggest the outcome of the jury trial on mental retardation might have been different had Dr. Call's credibility and testing been impeached with evidence of his use of a non-standardized, improperly administered, forced choice symptom validity test which he named the "Blackwell Memory Test."

¶32 We asked the trial court to determine whether trial counsel's failure to utilize this evidence could be considered a sound trial strategy and the trial court found "Petitioner's counsels' confusion over the 'administrative pseudonym' cannot be described as either a 'failure to discover' or 'trial strategy' and concluded 'any notion of ineffective assistance of counsel is unfounded.'" Again, this Court will give strong deference to the trial court's findings if supported by the record, but we shall determine the ultimate issue of whether trial counsel was ineffective. Rule 3.11(B)(3)(b)(iv), *Rules of the Court of Criminal Appeals,* Title 22, Ch.18, App. (2004); *see also Glossip,* 2001 OK CR 21, ¶20, 29 P.3d 597, 602.

¶33 At the evidentiary hearing, trial counsel admitted he knew Dr. Call administered two malingering tests from which he concluded Petitioner was not mentally retarded as the tests results seemed to indicate. One test counsel recognized as the TOMM test and the other he did not recognize but it did not occur to him to inquire into the origins of that test. It is evident from Petitioner's brief as well as counsel's testimony at the evidentiary hearing that his decision not to pointedly question Dr. Call's administration of the test we now know as the "Blackwell Memory Test" was a matter of trial strategy. However, it was a strategy based upon counsel's admitted failure to recognize the significance of and determine the origins of Dr. Call's testing and raw data.

¶34 We must determine whether counsel's failure to discover and utilize this evidence rises to the level of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's representation fell below an objective standard of reasonableness and (2) a reasonable probability

that, but for counsel's errors, the results of the proceedings would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id., 466 U.S. at 690-691, 104 S.Ct. at 2066.

¶35 We cannot fathom, in a case which boiled down to a battle of experts, why Petitioner's counsel failed to research the tests Dr. Call performed on Petitioner to confirm the origins of and the scientific validity of those tests before Petitioner's mental retardation hearing. The raw data was provided to counsel prior to the mental retardation jury trial. The evidence was discoverable with due diligence – that is clear from another attorney's discovery of the information in a separate and unrelated proceeding.

¶36 Although the trial court concluded in its last finding that the evidence in question would not have impacted the verdict rendered, we do not share that same confidence. Petitioner presented evidence supporting his

claim of mental retardation. Dr. Call's testimony and his testing was essential to refute Petitioner's claims and attack his experts' findings. Evidence Dr. Call had himself made up and administered a non-standardized test to support his conclusion Petitioner was malingering would have been valuable impeachment evidence. No reasonable trial strategy would have supported a decision not to utilize this important impeachment evidence. *See e.g. Glossip,* 2001 OK CR 21, ¶17, 29 P.3d at 601. Had it been discovered and utilized, there is a reasonable probability the outcome would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* 466 U.S. at 694, 104 S.Ct. at 2068.

¶37 Under the circumstances presented here, we do not have confidence in the jury's verdict that Petitioner is not mentally retarded. It is likely the outcome of the case, the jury's verdict, would have been different had counsel discovered and utilized the impeachment information relating to Dr. Call. Further, we are bothered that this State's witness seemingly, intentionally, misled the trial court and the parties about the reliability of his own tests to strengthen the State of Oklahoma's case against Mr. Salazar.

¶38 Accordingly, it is the decision of this Court that the jury's verdict is hereby reversed. We hereby vacate Petitioner's death sentence and modify his sentence to life imprisonment without the possibility of parole. 20 O.S.2001, § 3001.1. Because we grant relief on this issue, the remaining propositions of error need not be addressed.

DECISION

¶39 The jury's verdict on mental retardation in Comanche County District Court, Case No. CRF 1987-460, is hereby ***REVERSED.*** Petitioner's death sentence is ***VACATED*** and ***MODIFIED*** to life imprisonment without the possibility of parole. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY:	**C. JOHNSON, J.**
CHAPEL, P.J.:	CONCURS
LUMPKIN, V.P.J.	DISSENTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS IN PART/ DISSENTS IN PART

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

¶1 Upon a review of the record in this case, I find the trial judge has provided a more accurate analysis of the evidence in this case than related in this opinion and therefore, I must dissent.

¶2 Initially, I find the broad range of IQ test results spanning from 50 to 83 made a *ipso facto* showing Petitioner is not mentally retarded. Mental retardation is a cognitive defect that originates at birth and is not subject to change over time. *See Murphy v. State,* 2003 OK CR 6, ¶23, 66 P.3d 456, 460. A truly mentally retarded individual will not, can not, produce test results over such a broad spectrum as has Petitioner.

¶3 Further, I disagree with the majority's characterization of Dr. Call's testimony. Dr. Call, a board certified forensic psychologist, is well known to this Court for his testimony in several of the recent cases involving issues relating to mental retardation. The majority indicates that in testifying to Dr. Price's findings and opinion, Dr. Call used improper testing procedures, tests not "normed" for a person like Petitioner, and did not properly report the results. This is an incorrect statement of the record. The record reflects Dr. Call fully explained and disclosed his testing procedures, the tests were "normed" or appropriate for Petitioner, and that he reported all results.

¶4 The opinion further confuses the use of an "administrative pseudonym" to disguise the nature of an otherwise scientifically recognized test with the failure to use a scientifically recognized test. The record reflects the witnesses agreed there was no such independently recognized test labeled the "Blackwell Memory Test". This was merely a label utilized to hide the purpose of the test from

the test taker, the purpose being to identify malingerers. The actual test was the "Forced Choice Symptom Validity Test", as referred to by Dr. Call, or simply "Symptom Validity Testing" as recognized by Richard Rogers, Editor, not the author, of the book, *Clinical Assessment of Malingering and Deception, Second Edition* (1997).[1] Therefore, the testing procedure was recognized as a valid, scientific testing method, only the method of giving the test was in question. That issue had nothing to do with how Dr. Call might have labeled the test to deceive Petitioner as to the true meaning of the test, i.e. determine whether Petitioner was faking his level of mental capacity at the time.

¶5 I view the allegation of error due to the use of the pseudonym on the heading of the test a "red herring" in determining the real issues presented in this case. The evidence reveals Dr. Call did not administer a test he just dreamed up or created on his own. He administered a Forced Choice Symptom Validity Test which utilized accepted principles supported by scientific literature in the field. It appears this test was consistent with the accepted TOMM test for which Petitioner's trial counsel did prepare. Was the use of the term "Blackwell Memory Test" somewhat deceptive to counsel in the discovery process, as well as Petitioner in the testing process? Yes, but all counsel had to do was ask for a clarification as to the nature of the test and counsel would have been informed the test was simply a recognized application of the Forced Choice Symptom Validity Test that had been disguised to

[1] Rogers' disagreement with the test, as reflected in Petitioner's supplemental authority was the manner in which it was administered, i.e. failure to present the target word randomly rather than present the correct choice first as was done by Dr. Call.

get Petitioner's actual responses rather than a possible contrived response. Counsel did not do that. So, the only question this Court should ask is: "was the failure to ask that one question sufficient to declare trial counsel ineffective?" I don't think so.

¶6 The record reveals the State provided open discovery and Petitioner's counsel readily admitted they had all the testing information from the State and Dr. Call in sufficient time prior to trial to have researched and discovered this issue. They chose instead to focus on other areas and did not research the specific makeup of this particular testing mechanism. As counsel stated, a strategic choice was made not to give Dr. Call more opportunity to validate his opinions due to the strength of his testimony, albeit potential impeachment may have been available regarding the failure to place the target words in random selection throughout the test. How important the random selection placement is versus the placement made by Dr. Call in the test results we do not know. However, we do know other valid test results confirmed the opinion of malingering and even without the Forced Choice Symptom Validity Test, in this case labeled "Blackwell Memory Test", Dr. Call's opinion would have been admissible.

¶7 In this case, I trust the findings of a respected, seasoned trial judge, District Judge Allen McCall, over a cold paper record to determine the impact on the jury. This is not a case where the defense was deprived of any evidence or discovery that was needed in the preparation for this trial. Based on my reading of the record presented, I believe this Court is reaching conclusions not supported by the record regarding the tests administered by Dr. Call and his testimony in relation to that of other experts. Therefore, I must dissent to the Court's decision to reverse

the jury's verdict on mental retardation. We should follow the method of analysis set out in our recent case of *Myers v. State,* 2005 OK CR 22, ___ P.3d ___, and not just suppose there is error that does not exist in this record. As Judge McCall stated in his findings, "this was an outstanding jury, very attentive, and fair minded to all witnesses and counsel". The evidence supports the verdict of the jury and this Court, pursuant to *Myers,* should affirm that verdict, rather than looking for an excuse to reverse or modify a valid sentence.

LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:

¶1 I concur in reversing the verdict in this case. However, I dissent to modifying the sentence. I would reverse and remand for a new trial on the issue of mental retardation.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MAXIMO LEE SALAZAR,	)	
	)	
Petitioner,	)	Case No. PCD 2002-984
vs/	)	Comanche County Case
	)	#CRF-87-460
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 23, 2004)

On June 29, 2004, the above-styled matter came on for evidentiary hearing pursuant to Order of the Oklahoma Court of Criminal Appeals dated June 4, 2004. Petitioner, Maximo Lee Salazar, appeared in person and by his attorney, Ms. Diane Box. Petitioner's trial counsel, Mr. Bryan Dupler and Ms. Laura Arledge, also appear with Petitioner. Respondent is present by Mr. Robert Schulte, District Attorney.

The "ORDER REMANDING TO THE DISTRICT COURT OF COMANCHE COUNTY FOR AN EVIDENTIARY HEARING" directs the District Court "to conduct an evidentiary hearing into Petitioner's claim of newly discovered evidence and his claim of ineffective assistance of counsel. In particular, this Court is concerned with the availability of this evidence prior to Petitioner's mental retardation hearing, the effect the evidence would have had on the State's expert's testimony and the mental retardation determination, whether the failure to discover

and utilize this evidence was trial strategy, and whether the evidence would have impacted the verdict rendered."

The Court has heard the testimony of two witnesses called by Petitioner, and has examined the exhibits admitted into evidence during the evidentiary hearing. Additionally, the Court has reviewed the file and the transcript of Petitioner's mental retardation trial held September 2nd, 2003, thru September 5th, 2003.

By reference to the four areas of inquiry directed by the Court of Criminal Appeals, the Court makes the following findings of fact and conclusions of law.

1. "Availability of the claimed 'newly discovered evidence' prior to Petitioner's mental retardation hearing."

   The Court finds that, while there appears to be some confusion over the naming of the test in question, the actual test and results were in possession of the defense well prior to Petitioner's mental retardation trial. This does not appear to be a situation of "newly discovered evidence".

2. "The effect the evidence would have had on the State's expert's testimony and the mental retardation determination."

   Dr. Call's testimony during the evidentiary hearing indicates that the test which was thought to be newly discovered evidence was in fact a malingering test which he had named after his secretary in an attempt to disguise from the test taker the nature of the test. While his delivery of this explanation was smug, his reason for using an "administrative pseudonym" for his version of

the Forced Choice Symptom Validity Test (FCSVT) is acceptable and would have had little or no effect on his overall testimony (direct or cross).

Given the totality of the evidence submitted to the jury during Petitioner's mental retardation trial, it is extremely unlikely that the confusion over this "administrative pseudonym" would have had any effect on the jury's mental retardation determination. As indicated previously, this was an outstanding jury, very attentive and fair-minded to all witnesses and counsel. The evidentiary presentations by the State and Petitioner were excellent and it appeared to the Court that the instructions were understood and followed by the jury in arriving at the verdict. There exists in the record no reason to believe the mental retardation determination by the jury would have been different based on this "newly discovered evidence".

3. "Whether the failure to discover and utilize this evidence was trial strategy"

Petitioner's counsels' confusion over the "administrative pseudonym" cannot be described as either a "failure to discover" or "trial strategy". In the mountain of evidentiary material concerning Petitioner's claim of mental retardation, this confusion over the naming of a test is relatively insignificant and does not diminish Petitioner's Counsels' exemplary preparation and presentation of the evidence. To label this situation as "failure" or "ineffective assistance of counsel" would not only be unfair to Mr. Dupler and Ms. Arledge, but it would also set

an unattainable standard, i.e. perfect cross-examination. In hindsight, every capable trial lawyer could improve on his or her trial performance. Counsels' trial performance should not be hyper technically analyzed, but should be objectively judged under the totality of circumstances of each case. In this case, Petitioner was very effectively represented by his attorneys, Mr. Dupler and Ms. Arledge. Any notion of ineffective assistance of counsel is unfounded.

4. "Whether the evidence would have impacted the verdict rendered".

As stated above, under the totality of circumstances in this ease, the "evidence" in question would not have impacted the verdict rendered by the jury. The Court cannot overemphasize the outstanding preparation and presentation by all counsel, and the fairness with which they treated each other, the jury, and the Court. The Court is confident the verdict was not impacted by "newly discovered evidence" or "ineffective assistance of counsel".

Respectfully submitted,

/s/ Allen McCall
ALLEN McCALL
DISTRICT JUDGE

IN THE DISTRICT COURT OF COMANCHE COUNTY
STATE OF OKLAHOMA

MAXIMO LEE SALAZAR,	)	
Petitioner,	)	Comanche County
	)	No CRF-87-460
-vs-	)	
THE STATE OF OKLAHOMA,	)	Post Conviction
	)	No. PCD-2002-984
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Oct. 30, 2003)

Pursuant to the Order of the Court of Criminal Appeals, dated June 11, 2003, the undersigned Trial Judge hereby enters the following findings of fact and conclusions of law subsequent to jury trial on the issue of Petitioner's claim of mental retardation.

1. Jury trial began on September 2, 2003 and concluded on September 5, 2003, trial was conducted in accordance with *Lambert v. State,* 2003 OK CR 11___ P.3d ___.

2. Jurors were racially and gender diverse and of various educational levels. Throughout the trial, the jurors were prompt, attentive and respectful of their duties.

3. Other than a request for a dry-erase board, no questions were sent out from the jury after deliberations began.

4. After deliberating for approximately two hours, the jury returned a unanimous verdict finding that Petitioner was not mentally retarded. Upon polling the jury, each

individual juror stated without hesitation that this was his or her verdict.

5. Both counsel and the Court carefully refrained from any mention of Petitioner's death sentence and the details of Jennifer Prill's murder throughout the trial.

6. The verdict of the jury is supported by the evidence, and there is no indication from any source which indicates that the verdict of the jury was influenced by passion, prejudice or other arbitrary factors.

7. Counsel, Mr. Dupler and Ms. Arledge for Petitioner and Mr. Schulte and Mr. Elmore for the State, presented well prepared and thorough cases to the jury and were invaluable assets to the Court in this proceeding. Counsels' exemplary conduct allowed the jurors to concentrate on the evidence and the issue before them, without the distractions which can sometimes occur in the stressful environment of a jury trial.

8. The procedure and instructions mandated by the Court of Criminal Appeals are well suited for this type of proceeding, and as stated, no questions were sent by the jury in reference to the Court's instructions. This is an indication to the Trial Judge that the instructions were understood and followed by the jury.

9. While this Court is concerned about the prejudicial effect of evidence admitted during the trial in reference to acts of burglary and robbery committed by the Petitioner in close proximity of time to the murder, the evidence was narrowly confined to the issue of Petitioner's claim of mental retardation. The Court instructed the jury several times, both orally and in written instructions, that evidence of these criminal offenses was admitted solely as it

pertained to the issue of mental retardation. It is the Trial Court's conclusion that this evidence did not unduly prejudice the jury in arriving at a verdict. Certainly, the pre-crime and post-crime conduct of a person claiming mental retardation is relevant to the determination of whether that person is in fact mentally retarded. If Petitioner's prior conduct included military service or little league coaching, it would certainly have been relevant in this case. Unfortunately, *but by his choice,* this Petitioner's prior conduct did not portray him in a favorable light and was not beneficial to his claim of mental retardation. Petitioner's behavior is no less relevant because it was criminal in nature. In the final analysis, the evidence was more probative than prejudicial.

10. The execution of a mentally retarded prisoner violates the Cruel and Unusual Punishments clause of the Eighth Amendment to the United States Constitution, and the even broader protections of Art. 2, §§ 7 and 9 of the Oklahoma Constitution. *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Murphy v. State,* 2002 OK CR 32, 54 P.3d 556.

11. A person is "mentally retarded": **(1)** If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; **(2)** The mental retardation manifested itself before the age of eighteen (18); and **(3)** The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living;

self-direction; academics; health and safety; use of community resources; and work. *Murphy.* at ¶ 31, 54P.3d 557.

12. This Court has the benefit of hearing all of the evidence presented by Petitioner to support his claim of mental retardation at the jury trial. For this reason, it seems entirely unnecessary to recount that evidence at this point in any great detail. The same applies to the State's evidence.

13. Upon *de novo* review of the evidence presented at trial, and applying the standard of a preponderance of the evidence, both as required by *Murphy v State* 2002 OK CR 32, 54 P.3d 556 and *Lambert v State* 2003 OK CR 11 ___ P.3d ___, the Court hereby finds that Petitioner, Maximo Lee Salazar, has failed to establish by a preponderance of the evidence that he is mentally retarded under current Oklahoma law. No further sentence disposition is necessary by the Trial Court. These conclusions have been reached independently of the jury verdict in this case, and after thorough consideration of both the Petitioner's and State's evidence.

14. Although not specifically authorized by *Murphy* or *Lambert,* but in fairness to both the Petitioner and State, the Trial Court allowed each party to submit proposed Findings of Fact and Conclusions of Law to assist the Trial Court. The Court also held a post-trial motion hearing to allow Petitioner to present a Motion for New Trial, judgment notwithstanding the verdict and post-trial review of verdict. If this Honorable Court deems that these post-trial matters were inappropriate, the consequences should be mine and not counsels', as they were merely trying to assist the Court.

Finally, the Trial Court is appreciative of the indulgence of this Honorable Court and counsel in granting an extension of time in which to prepare these findings and conclusions.

Respectfully submitted,

/s/ Allen McCall
Allen McCall
District Judge

2005 OK CR 26
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT WAYNE LAMBERT Petitioner v. THE STATE OF OKLAHOMA Respondent.	)	FOR PUBLICATION Case No. PCD-2002-974

OPINION GRANTING POST-CONVICTION RELIEF

(Filed Dec. 7, 2005)

CHAPEL, PRESIDING JUDGE:

¶1 Robert Wayne Lambert was tried by jury, convicted of two counts of first degree murder, and received two death sentences. This Court affirmed Lambert's convictions for murder, and the United States Supreme Court denied certiorari.[1] This Court affirmed the denial of Lambert's first Application for Post-Conviction Relief.[2] Lambert's application for federal habeas corpus relief is pending in the United States District Court for the Northern District of Oklahoma.[3] On October 31, 2002, Lambert filed a Successor Application for Post-Conviction Relief in a Death Penalty Case, and a Request for Evidentiary

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[1] *Lambert v. State*, 1999 OK CR 17, 984 P.2d 221, *cert. denied*, 528 U.S. 1087, 120 S.Ct. 816, 145 L.Ed.2d 687 (2000).

[2] *Lambert v. State*, No. PCD-1998-739 (Okl.Cr. February 10, 2000) (not for publication).

[3] *Lambert v. Mullin*, No. 00-CV-0313 K (N.Dist.Okl.).

Hearing on the issues of mental retardation and second-stage jury instructions. This Court remanded Lambert's case for an evidentiary hearing on the issue of mental retardation on November 15, 2002.[4] On December 13, 2002, we held the evidentiary hearing in abeyance and directed the State to respond to Lambert's Successor Application. The State's response was filed March 10, 2003. On May 29, 2003, this Court remanded the case to the District Court of Creek County for a jury determination of mental retardation.[5] That jury hearing was conducted in May 2004, before the Honorable Donald D. Thompson, and concluded with a finding that Lambert is not mentally retarded. The District Court filed its Findings of Fact and Conclusions of Law with this Court on June 23, 2004. Lambert filed a Supplemental Brief in response to those findings and conclusions, raising eighteen propositions of error.[6]

¶2 The Court remanded this case for a jury determination followed by findings of fact and conclusions of law from the trial court. While the trial court's findings and conclusions assist this Court in its decision, the jury is the finder of fact in this proceeding. Thus, we will review the alleged errors occurring during the proceeding on remand in the same manner as errors raised on direct appeal from a trial on the merits. This Court reviews the jury's factual

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[4] *Lambert v. State*, No. PCD-2002-794 (Okl.Cr. November 15, 2002) (not for publication).

[5] *Lambert v. State*, 2003 OK CR 11, 71 P.3d 30.

[6] The State did not file a supplemental brief. While Lambert's supplemental brief technically meets the content and citation requirements set forth in Rule 3.5, this Court strongly discourages use of this "abbreviated format", particularly in capital cases. Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005).

determination in the light most favorable to the State, to determine whether any rational trier of fact could have found that the defendant failed to meet his burden of proving mental retardation by a preponderance of the evidence.[7] After a complete review of the record, transcripts, exhibits and pleadings filed in this case, we find that factual and legal errors, as well as the interests of justice in this case, require relief. Rather than remand this case for yet another court proceeding, we modify Lambert's two death sentences to two sentences of life imprisonment without the possibility of parole.

¶3 Lambert committed the crimes in this case in 1987, and the case has been in the criminal justice system since 1988. Lambert's first trial resulted in convictions for murder and capital sentences which were reversed due to a serious legal error at trial. During the pendency of that first direct appeal to this Court, Lambert claimed, in a competency hearing, that his low intelligence prevented him from giving a voluntary confession – he raised the issue of mental retardation. Lambert was retried, convicted, and again sentenced to death. During that retrial Lambert presented evidence of mental retardation in mitigation, in an effort to avoid the death penalty. The State did not contest Lambert's claim that he was mentally retarded; in fact, the State argued that his mental retardation supported a death sentence because Lambert was unable to learn from his crimes and would continue to pose a danger to society. On appeal, Lambert again raised the issue of mental retardation and asked this Court to find that the execution of mentally retarded persons

[7] *Myers v. State*, 2005 OK CR 22, ¶6, 7.

violates the United States Constitution. Based on United States Supreme Court law at that time, we declined.[8] In 2002, the United States Supreme Court determined that execution of mentally retarded persons is unconstitutional.[9] Lambert subsequently filed this application for post-conviction relief on the issue of mental retardation. It is in this context that we review the jury's determination that Lambert is not mentally retarded, and Lambert's claims of error on appeal.

¶4 In Proposition XV, Lambert correctly claims that the jury's verdict, that he is not mentally retarded, is contrary to the clear weight of the evidence. In order to prove mental retardation, Lambert must first demonstrate to the court that he had an IQ test under 70. After meeting this threshold requirement, Lambert must show, by a preponderance of the evidence, that he meets the three prongs of the *Murphy* test: sub-average intellectual ability, manifestation before age 18, and significant limitations in adaptive functioning in at least two of nine skill areas.[10] The jury had to decide whether, more probably than not, Lambert met this test. The overwhelming weight of the evidence shows he did.

¶5 This Court has defined mental retardation for *Atkins* purposes as:

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[8] *Lambert v. State*, 1999 OK CR 17, 984 P.2d 221, 238, *cert. denied*, 528 U.S. 1087, 120 S.Ct. 816, 145 L.Ed.2d 687 (2000) (per curiam, Chapel, P.J., concurring in part and dissenting in part).

[9] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[10] *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 567-68 (footnotes omitted).

> A person is "mentally retarded": (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work. . . . [N]o person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test.[11]

¶6 We begin by addressing the burden of proof. The test above requires that a defendant (a) meet the threshold legal requirement of an IQ test under 70, and (b) prove the three prongs of the *Murphy* test by a preponderance of the evidence: sub-average intellectual ability, manifestation before age 18, and significant limitations in adaptive functioning in at least two of nine skill areas. Only when all of these requirements are met will a defendant meet the definition of mental retardation for capital sentencing purposes.[12] The third prong, significant limitations in

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[11] *Id.*

[12] For instance, a severely depressed person may well have limitations in adaptive functioning sufficient to satisfy the third prong

(Continued on following page)

adaptive functioning, describes deficits common in mentally retarded people.[13] These limitations may also be caused by other mental or social conditions. A defendant must show he has significant limitations in adaptive functioning, but is not required to show that mental retardation is the cause of his limitations in these skill areas. In order to counter such a claim, the State must present evidence negating those particular skill limitations. Unless a defendant's evidence of particular limitations is specifically contradicted by evidence that he does not have those limitations, then the defendant's burden is met no matter what evidence the State might offer that he has no deficits in other skill areas. In fact, the State need not present any evidence that a capital defendant can function in areas other than those in which a deficit is claimed. In capital mental retardation proceedings, the State's first response must always be to counter the evidence presented by the defendant.

¶7 In addition to being a threshold requirement, evidence of IQ testing may be admitted to the jury to prove whether a defendant functions at a significantly subaverage intellectual level. Lambert presented evidence of several tests for this purpose. All six IQ tests over 21 years of Lambert's life, beginning in childhood, placed him under 70, and thus within the mildly mentally retarded range. This includes the test administered by the State's own

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of the *Murphy* test. However, unless that person can meet the entire test, he will not be mentally retarded for capital sentencing purposes.

[13] *Atkins*, 536 U.S. at 318, 122 S.Ct. at 2250; Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers*, 5 Journal of Appellate Practice & Process 297, 303-304 (Fall 2003).

expert, Dr. Call, on which Lambert had an IQ of 66. Dr. Call did not testify that Lambert was not mentally retarded. In fact, he explicitly stated he could not say that Lambert was not mentally retarded. In order to counter the overwhelming evidence of "at least one" IQ test under 70, Dr. Call testified that Lambert was malingering, and had done so since childhood, in an effort to be thought mentally retarded. Dr. Call's diagnosis stands alone in Lambert's testing record: although some medical professionals believed Lambert might have faked particular illnesses or mental problems over the years, he was never described as malingering with regard to the consistent mental retardation diagnoses. Other expert witnesses noted that it is difficult to fake mental retardation over a period of years.[14] Although Dr. Call testified that some of Lambert's other IQ tests were not reliable because they did not include a test of adaptive functioning, he himself did not administer an adaptive functioning test. Dr. Call administered one IQ test and an achievement test. In order to reach his "malingering" diagnosis, he administered five malingering tests.[15] Dr. Call is a forensic psychologist. His

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[14] *See also* Davis, *supra* n. 14 at 307-308 (malingering in capital mental retardation assessments unlikely, as defendant would have to begin malingering in childhood, before capital incentive occurred); Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. Rev. 255, 276 (Spring 2003); Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental and Physical Disability L. Rep. 11, 14 (January/February 2003).

[15] The tests were in this order: malingering, IQ and malingering, malingering, achievement, malingering, and malingering. In other cases, Dr. Call has administered a non-normed, nonstandardized "forced choice symptom validity test", the Blackwell Memory Test, which he created himself to test for malingering. *See Salazar v. State*, PCD-2002-984; *Blonner v. State*, District Court of Oklahoma County Case No. CF-99-6416. The trial court's determination that Blonner was

(Continued on following page)

practice has not primarily been in the field of mental retardation, and he has not had a mentally retarded patient in a clinical setting for fifteen years.[16] However, since 2002 he has made a specialty of examining capital defendants for mental retardation.[17] Taking into account Dr. Call's testimony, the record easily shows that Lambert had at least one IQ test under 70. This, along with the expert testimony describing Lambert's intellectual functioning at those IQ levels, showed that he functioned at a significant sub-average intellectual level.

¶8 For further proof of the first prong of the *Murphy* definition, Lambert offered evidence of significant limited intellectual ability in each area. Several witnesses testified that Lambert had difficulty in communication orally and through reading and writing, and could not understand relatively simple instructions or information. For example, former cellmates testified they often filled out prison requisition slips for Lambert, and that he checked

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not mentally retarded was appealed to this Court in O-2004-1175 (pending before the Court). This Court may take judicial notice of material filed with the Court. Dr. Call did not use the Blackwell Memory Test in this case. He did, however, use the Oklahoma Spelling Test, a non-normed, nonstandardized malingering test which he created. Trial Tr. V 1270-71.

[16] On cross-examination, Dr. Call admitted none of the classes, seminars, or publications in his extensive CV are related to the area of mental retardation.

[17] In each case, Dr. Call has either administered or attempted to administer several malingering tests, as he did here, along with an IQ test. *Salazar v. State*, PCD-2002-984; *Blonner v. State*, O-2004-1175; *Pickens v. State*, PCD-2002-983. Dr. Call attempted to administer several malingering tests to Pickens but was unable to do so when Pickens refused to speak with him. Dr. Call also testified in *Myers v. State*, 2005 OK CR 22. However, he did not suggest Myers was malingering since most of Myers's IQ tests were above 70.

out books for other inmates to read since he did not read books. Prosecutors offered evidence from prison employees who had frequent but brief contact with Lambert, had received his requisition slips, and did not believe he was retarded. However, those employees could not say that Lambert himself filled out all his requisitions, as they were not present when the slips were written. They could not say Lambert read the books he checked out. While they disagreed on many issues, these witnesses could not contradict Lambert's cellmates' testimony.

¶9 Former teachers, jailers and family members testified about their difficulty in communicating with Lambert, as well as Lambert's lack of impulse control and apparent inability to understand thought processes or feelings. They also indicated that Lambert failed to learn from experience or understand logical consequences. The State's same institutional witnesses testified that they had little or no trouble communicating with Lambert, that he was not a discipline problem in prison, and that he seemed to understand the routines and procedures expected of him. None of these witnesses testified to long or complex conversations which required an exchange of ideas or feelings. In addition, all the expert witnesses agreed that mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings. A rational trier of fact could not have found by a preponderance of the evidence that Lambert did not meet his burden to prove sub-average intellectual functioning which affected his abilities in the enumerated areas.

¶10 The second prong of the *Murphy* definition is satisfied. Lambert proved, and the State did not contest,

that his deficits in functioning and IQ tests below 70 manifested before he was eighteen years old.

¶11 Turning to the third prong, Lambert provided proof of significant limitations in adaptive functioning in four skill areas: health and safety, academics, communication, and social and interpersonal skills. Lambert received very little parental supervision as a child. He was often unclean, hungry and inappropriately dressed. He lay in the street in traffic, ran under a moving train, cut and burned himself, and swallowed wire. Lambert left school after the 7th grade, when he was fifteen. Until that point, he made poor grades or failed in each class since kindergarten. He repeated first grade. He was placed in educably mentally handicapped (EMH) classes in elementary school; testimony indicated those classes at Lambert's school housed mentally retarded students. The known examples of Lambert's writing in the record show poor printing, very poor spelling, and lack of organized thought. He had few friends, preferred the company of younger children, and was easily manipulated. Prosecutors agreed with Lambert's claim of limitations in academics, health and safety, and social and interpersonal skills, but offered alternative explanations for these limitations. An alternative explanation for an agreed condition is not a negation of that condition. By accepting Lambert's assertions that he had limitations in these skill areas, the State failed to contradict his claims. A rational trier of fact could not have found that Lambert did not prove, by a preponderance of the evidence, that he had significant limitations in adaptive functioning in three skill areas.

¶12 Lambert proved all the factors in the *Murphy* definition by a preponderance of the evidence. He had six IQ tests under 70. He had sub-average intellectual functioning

and limitations in adaptive functioning in three uncontested skill areas. All these factors manifested before Lambert was 18. The jury determination that Lambert is not mentally retarded is not supported by the record; no rational trier of fact, presented with this evidence, could have found that Lambert failed to meet his burden by a preponderance of the evidence. Although we give great deference to jury findings of fact, we are compelled to conclude that, given the evidence presented, the determination that Lambert is not mentally retarded is not supported by the evidence.

¶13 In Propositions I and II, Lambert correctly claims that the trial court erred in refusing his requests to sequester the jury after the case was submitted to them for decision. After the jury was instructed and heard closing argument, the trial court overruled Lambert's request to sequester the jury, told jurors they were free to leave, and directed them to return at 9:00 a.m. the following day.[18] After deliberations began the jury requested a smoking break. Both parties asked the trial court to arrange to keep the jurors confined together during this break. The trial court refused, telling jurors they could go separate and smoke outside but not to discuss the case in small groups or allow anyone to approach them.[19] In *Johnson v. State*,[20] a remarkably similar case, we recently found this practice is error, and prejudice is presumed unless the State proves otherwise. In fact, the first error in

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[18] Trial Tr. VII 2015.

[19] Trial Tr. VII 2018.

[20] *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 48 (finding 22 O.S.2001, § 857 requires sequestration after the jury has heard instruction and argument, not after bailiff is sworn).

this case is more egregious – in *Johnson*, jurors were only separated for a long lunch period, where here they were sent home for the evening. The State has not offered any explanation which would overcome the presumption of prejudice to Lambert. The morning jurors returned to begin deliberations, a local newspaper had an article about the case.[21] In *Johnson*, this error warranted reversal and remand for a new trial. Given the significantly different history of this case, we find that the error contributes to our decision to resolve this case by vacating the death sentence and imposing a sentence of life imprisonment without the possibility of parole.

¶14 In Propositions III and V, Lambert complains that the trial court erred in refusing his repeated requests to conduct individual voir dire and subsequently passing the jury for cause over objection. The decision to conduct individual voir dire is within the discretion of the trial court, and will not be disturbed absent an abuse of discretion.[22] Retrospective mental retardation proceedings in a capital case are unlike any other jury proceedings, and require great care in order to avoid overwhelming prejudice to the defendant. The only issue in these proceedings is whether a defendant is mentally retarded. In remanding this case, we explicitly directed, "The jury should not hear evidence of the crimes for which Lambert was convicted,

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[21] Defense Exhibit M.

[22] *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 393, *cert. denied*, 531 U.S. 888, 121 S.Ct. 208, 148 L.Ed.2d 146 (2000); *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120, 1127, *cert. denied*, 528 U.S. 895, 120 S.Ct. 226, 145 L.Ed.2d 190 (1999).

unless particular facts of the case are relevant to the issue of mental retardation."[23]

¶15 Defense counsel requested individual voir dire to ensure that the jury panel was not tainted by any prospective juror's knowledge of the facts of the crime in this highly publicized case. We cannot say the trial court abused its discretion in initially rejecting this request, before any prospective jurors had indicated they had prior knowledge of the case. We also do not find that the venire was tainted by some prospective jurors' brief assents when asked generally whether they remembered anything about the case. However, shortly after voir dire began, prospective juror Fugate responded to a general question about knowledge of the case by stating, "They kidnapped a woman and a man and put them in the trunk of a car and set it on fire."[24] Thus, during the first day of voir dire, all prospective jurors heard exactly what this Court explicitly stated they should not hear. Despite this clear violation of this Court's directions, the trial court continued to overrule Lambert's repeated requests to quash the panel. During the trial the trial court prohibited witnesses from using the words "kidnapping" or "arson" when referring to the crimes for which Lambert received the death penalty.

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[23] *Lambert*, 71 P.3d at 31.

[24] Trial Tr. I 115-116. Several jurors subsequently mentioned Fugate's comments in stating they now either knew or remembered something about the facts of the case. As Lambert argues in Proposition IV, this was merely one of several dubious voir dire rulings. For example, one prospective juror had been called to Lambert's co-defendant's jury venire, knew the victim's parents, and listened to that entire trial. The trial court refused to excuse him for cause. The trial court denied Lambert's motion for additional peremptory challenges to replace jurors with knowledge of the case, who should have been removed.

However, jurors were already aware of these facts. They had heard them in voir dire.

¶16 The trial court's decision to deny individual voir dire led directly to a tainted jury panel.[25] This abuse of discretion was subsequently exacerbated by passing a tainted panel for cause, over Lambert's objections. Over almost a century this Court has consistently held that all doubts about juror impartiality should be resolved in the defendant's favor.[26] Lambert's subsequent trial before a tainted panel deprived him of an impartial jury, thus violating his right to due process.[27] In combination with other errors, these errors in voir dire compel us to grant relief.

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[25] Prosecutors and the trial court appeared to believe that this error was cured when prospective jurors said they could set aside knowledge of the facts of the case when determining the issue of mental retardation. This reflects a fundamental misunderstanding about this Court's directions on remand. We recognize that a defendant is entitled to a fair jury, not a perfect one, and some individuals may have had some knowledge of the case. However, our ruling was designed to protect the integrity of the mental retardation proceedings by ensuring that the jury panel as a whole did not hear the specific facts of crimes Lambert committed.

[26] *See, e.g., Matthews v. State*, 2002 OK CR 16, 45 P.3d 907, 915, *cert. denied*, 537 U.S. 1074, 123 S.Ct. 665, 154 L.Ed.2d 570; *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 437, *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527; *Simpson v. State*, 1992 OK CR 13, 827 P.2d 171, 175; *Hawkins v. State*, 1986 OK CR 58, 717 P.2d 1156, 1158; *Tibbetts v. State*, 1985 OK CR 43, 698 P.2d 942, 945; *Tegeler v. State*, 9 Okl.Crim. 138, 130 P. 1164, 1168 (1913), quoting *Johnson v. State*, 1 Okl.Crim. 302, 97 P. 1059, 1068 (1908).

[27] *Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 741; *Morgan v. Illinois*, 504 U.S. 719, 726, 112 S.Ct. 2222, 2228, 119 L.Ed.2d 492 (1992).

¶17 In three propositions, Lambert complains that irrelevant, inadmissible and prejudicial evidence was improperly admitted, and affected the jury's determination of mental retardation. All these propositions have merit. We will discuss each separately. However, they all rely on the same general legal principle – the application of the rules of evidence. The rules of evidence do not cease to apply merely because a jury is considering mental retardation rather than guilt or innocence. "Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence."[28] Otherwise relevant evidence may be prohibited by the Oklahoma or United States Constitutions, Oklahoma statutes, or the evidence code.[29] When balancing a claim that particular facts of a crime are relevant to the issue of mental retardation, a trial court must still consider whether its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."[30]

¶18 The State proffered a great deal of evidence surrounding the facts of the capital crimes, as well as other crimes Lambert was alleged to have committed. Several witnesses were allowed to testify regarding Lambert's criminal activity in great detail, over objection. The State argued that evidence of any criminal activity shows an ability to think abstractly rather than concretely,

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[28] 12 O.S.2001, § 2401.

[29] 12 O.S.2001, § 2402.

[30] 12 O.S.Supp.2003, § 2403.

and to plan and execute schemes beyond the capacity of mentally retarded persons. Assuming that, in particular instances, this is true – that a particular crime requires a level of abstract thinking showing intelligence and thus is relevant to mental retardation proceedings – that evidence must still be weighed under the test above before it is admissible. Nothing in the record before this Court suggests that the trial court weighed the bulk of this evidence for the danger of unfair prejudice, confusion of the issues, or the possibility that it might have misled the jury. Indeed, the record suggests that this fundamental rule of evidence was disregarded.

¶ 19 In Propositions VIII and X Lambert complains that his constitutional rights were violated by the introduction of irrelevant, inadmissible and prejudicial evidence relating to his capital crimes as well as other adjudicated and unadjudicated crimes. We agree. When remanding this case we explicitly stated,

> Lambert's criminal conviction and death sentence are not relevant to this issue. The jury should not hear evidence of the crimes for which Lambert was convicted, unless particular facts of the case are relevant to the issue of mental retardation. *Any such evidence should be narrowly confined to that issue.* The jury should not hear evidence in aggravation or mitigation of the murders for which Lambert was convicted, or any victim impact evidence.[31]

¶20 We first note that this mandate was not confined solely to evidence of the capital crimes, but to any

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[31] *Lambert*, 71 P.3d at 31 (footnote omitted, emphasis added).

crime for which Lambert *was convicted.* It did not contemplate evidence of unadjudicated crimes at all, beyond noting that there should be no evidence in aggravation of the capital crimes. Over objection, the State presented several witnesses who testified in detail regarding two unadjudicated crimes Lambert was alleged to have committed in Kansas.[32] These crimes had been used in aggravation against Lambert during his death penalty case. As Lambert had not been convicted of these crimes, this evidence was not within the restrictions on admissible evidence set forth in *Lambert*, was highly prejudicial without being probative on the issue of mental retardation, and should not have been admitted. The State also presented evidence that Lambert had abused drugs. Lambert had no drug convictions. Mental retardation is a condition present at birth,[33] and subsequent drug abuse makes it no more nor less likely. This evidence was irrelevant and was improperly admitted.

¶21 The prosecution consistently argued that evidence of the facts of crimes was necessary to show that Lambert could function – drive, give and understand directions, use a weapon, etc. This reveals a fundamental misunderstanding regarding the burden of proof in these proceedings. As we note above, Lambert was required to show, by a preponderance of the evidence, that he had

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[32] The witnesses included the two victims, who were allowed to testify at length to specific details of the crimes, including holding them against their will, physical violence, and crimes committed upon their bodies. Other witnesses also mentioned knowledge of the details of these crimes.

[33] *Murphy*, 66 P.3d at 460 ("Mental retardation is not an after-acquired disability that arises from a person's lifestyle choices, but one that originates from birth.").

limitations in adaptive functioning in two of nine areas: communication, self-care, social and interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.[34] Unless Lambert's evidence of particular limitations was negated by evidence presented by the State *on those issues*, then Lambert's burden was met. None of the evidence of criminal activity went to any of Lambert's claims of adaptive function limitations. Thus, strictly speaking, none of it was relevant to disprove those claims. Its relevance regarding the prosecution's claims that Lambert could function in other areas was thus necessarily limited by the prosecution's failure to disprove Lambert's claims. The limited relevance of this evidence of criminal activity was substantially outweighed by the danger of unfair prejudice.

¶22 In addition, Lambert had to show that his subaverage intellectual level substantially limited his "ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[35] Again, the State should first focus on refuting any evidence presented by a capital defendant, before introducing additional evidence of intellectual ability. We discussed the State's efforts to do so above. This prong of the definition may have been the focus of the prosecution's arguments that evidence of criminal activity was relevant to show Lambert could give and follow directions, commit crimes based on his observation of potential victims, and order his victims and co-defendants to

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[34] *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 568.

[35] *Murphy*, 54 P.3d at 567.

engage in specific actions. However, any potential relevance should still have been balanced against the danger that it would be substantially outweighed by unfair prejudice; the record shows this evidence, as detailed below, was more prejudicial than probative.

¶23 The prosecution also claimed that evidence of crimes was relevant because Lambert had chosen a life of crime. This argument suggests that the prosecution itself was confused regarding the purpose of this proceeding. Lambert's chosen profession would only be relevant to the issue of mental retardation if it were something a mentally retarded person could not do. For instance, if Lambert were a banker or teacher, this would cast doubt on his claim of retardation. However, all the experts testified that mentally retarded people can and do commit crimes. Lambert's alleged choice of a life of crime shows that he is a bad person, without resolving the issue of mental retardation. This argument could only confuse the issues in the case and mislead the jury.

¶24 In closing argument, prosecutors stressed that the evidence of crimes showed Lambert was "street smart" and therefore could not be mentally retarded. No evidence in the record supports the assertion that mildly mentally retarded persons cannot be "street smart" and survive outside an institution. In fact, Lambert's expert testified otherwise. All the evidence of "street smarts" was connected to Lambert's criminal activity. Again, this line of reasoning confused the issues and misled the jury.

¶25 The record does not show any serious attempt to comply with our instruction in *Lambert* that any evidence of crimes be narrowly confined to the issue of mental retardation. For example, over Lambert's objections the

State presented evidence that Lambert had pled guilty to charges resulting from a "home invasion" crime.[36] One witness's testimony on this issue was presented to show that, during those proceedings, Lambert did not raise the issue of mental retardation. Whether previous counsel entering a guilty plea in a noncapital case chose to bring up mental retardation is not relevant to any issue in these proceedings. Another witness testified to specific details of the crimes involved, including kidnapping of the female victim and her hysterical state when found by police. These details were irrelevant to the issue of mental retardation and could only have served to confuse the issue and mislead the jury. Prosecutors argued the testimony was relevant to show that Lambert could understand and give directions and knew how to find places near where he had previously lived. No attempt was made to narrowly confine this evidence to that issue. If prosecutors wanted to show Lambert knew where he had lived before, could find it again, and could direct others to it, they should have put on that information without using the context of a criminal case by injecting facts of specific crimes. A third source of evidence regarding this home invasion was an audiotape of Lambert's confession to the crime, including his statement that they planned to rob that house because they thought it was a dope house. All the evidence recounting the facts of this crime was highly prejudicial.

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[36] The home invasion occurred in September, 1987, and Lambert entered a plea in March, 1988, after his arrest in the capital case occurred and capital proceedings had commenced. Prosecutors also used details of a crime Lambert committed as a juvenile, including a plan to break in to an old man's house, tie him up and rob him.

¶26 The State presented a great deal of evidence regarding the facts of the capital crimes for which Lambert was convicted. This evidence included the victims' names; watching (or "stalking", as the prosecutor argued) the victims before the crime; the taking of the victims against their will at knifepoint; the use of BB guns resembling real guns; the victims' transportation to the location at which their bodies were found; Lambert's ability to cut a gas line; his subsequent drive, with his co-defendant [Hain], to a location in Kansas where his sister lived; Lambert's arrest; and his videotaped confession. While words referring to kidnap and arson were consistently barred or redacted from the testimony, facts describing or leading to those crimes were not. No attempt was made to narrowly confine any evidence which could have been relevant to mental retardation. Instead, the jury was permitted to hear almost every detail of the crimes, Lambert's subsequent flight, and his arrest.

¶27 The State argued Lambert's confession was necessary to show that he could talk with police, relate events, answer questions, and did not appear mentally retarded. It is unclear how any of this reasoning applies to the definition of mental retardation in capital cases.[37]

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[37] *See Atkins*, 536 U.S. at 318, 122 S.Ct. at 2250: "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not

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Every expert who testified agreed that a mildly mentally retarded person can remember events and is capable of carrying on conversations on specific topics. Experts also agreed that mentally retarded persons can often drive, remember how to get places they have been before, and commit crimes which do not require abstract thinking. Experts and laypeople testified that one can look at and converse with a person and not tell whether they are mildly mentally retarded.

¶28 Even though it was of dubious relevance, a redacted videotape of his confession in the capital case was admitted over Lambert's objection and shown to the jury.[38]

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warrant an exemption from criminal sanctions, but they do diminish their personal culpability." [footnotes omitted.]

[38] Throughout the tape Lambert volunteers very little but responds to specific questions. Lambert's confession begins with his statement that they were fixing to break into a house to rob it. The tape then skips. Lambert and his co-defendant [Hain] notice two people in a car, open its doors and tell the man and girl in it not to scream, get in, and tell the girl to drive. Lambert then says he had her stop and told her to get in the back seat with him, while Hain held a knife to the man's throat. They tied both victims up and put them in the trunk, after which Lambert drove the girl's car and Hain followed him in the man's truck to Sapulpa. They stopped and Lambert cut the car's gas line. The redacted tape picks up where officers ask Lambert where he originally saw the victims' car. While he knows the street, he does not know the area of the city until police officers give him the name. Lambert describes the girl's appearance and the victims' location in the car, then repeats the initial facts of the crime. Lambert said again that he and Hain got in the car and Hain put a knife to the man's throat, and that he made the girl sit in the back next to him and gagged her. He said they got the man's truck, then tied him up and put him in the trunk of the car. Lambert described in detail how the man was tied. He again says they drove to Sapulpa where they stopped, got out, and he cut the car's gas line. The redacted tape picks up with Lambert saying they drove to Kansas, stopping at a friend's house first. He estimates the time of the crime, noting that it was turning daylight as they stopped

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This confession begins with a plan to rob a different house. Lambert describes finding and taking the victims, Hain holding a knife to the male victim's throat, and driving to a separate location. Lambert gives a detailed description of how he cut the car's gas line, and how he heard the man making noise and trying to kick his way out of the trunk as Lambert walked away. He says they took $500 in cash from the victims. Any reference to arson or the car fire was redacted. However, jurors had heard in voir dire that Lambert had put the victims in the car's trunk and set it on fire, and could have made that inference from the redacted tape itself. Even assuming that some of the information in Lambert's confession, or his demeanor on

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the cars. The redacted tape begins again with Lambert saying he and his co-defendant took money and a wallet from the man's pockets, and he got $60 that the girl said was on her back floorboard. Lambert says the total was close to $500; Hain took charge of the cash and split it with him. Lambert tells officers where he and Hain stayed when they reached Wichita. Lambert says he told one person about the crimes, but that person told a lot of other people so he and Hain had to leave. Lambert described Hain to police in detail, particularly his tattoos, and stated when they first met. Returning to the crime, Lambert stated he was driving when they left the crime scene. The tape is redacted throughout this portion. Lambert says some men's clothing was in the truck, and he left a tie somewhere in Kansas. After a pause, the tape begins again, with a redacted question about Lambert or Hain tying up the man. Lambert said they had two BB guns. He said the victims never asked to be let go, but asked him not to hurt them. He described what Hain wore. An officer asked whether, when Lambert walked away from the car, he heard hollering. Lambert said no, he heard the man making a noise, trying to kick his way out of the car. Lambert imitated the noise. The tape shows officers asking questions and Lambert responding with words and gestures, as the sound is redacted. The sound resumes where Lambert describes in detail how he cut the gas line with a tool Hain carried. Lambert says he knew Tulsa and Sapulpa police were looking for him. He describes his conversations with his sister, says he intended to turn himself in but was arrested first, and described his arrest.

the tape itself, was relevant to the issue of mental retardation, the tape as a whole was overwhelmingly prejudicial. The details above, for instance, are exactly the type of evidence this Court intended to prohibit. Hain's use of a weapon, the amount of money taken, and the victims' attempt to escape add nothing to the question of Lambert's mental retardation.

¶29 Much of the evidence of criminal activity was irrelevant and simply inadmissible. For example, the prosecutor asked one police officer if he was aware that Lambert was accused of crimes in Kansas, spanning three months, involving five women. There is no conceivable circumstance under which this information could be relevant to the issue of mental retardation. It could only serve to prejudice the jury.

¶30 The bulk of the State's case consisted of evidence of Lambert's crimes, adjudicated and unadjudicated. Each crime, beginning with Lambert's juvenile criminal activity, was described in detail by several witnesses, including (through audio and videotape) Lambert himself. In *Lambert*, this Court set forth parameters for this proceeding. Our intention was to offer Lambert and the State a fair trial on the sole issue of mental retardation. Attempting to determine whether a capital defendant is mentally retarded, after his conviction and the imposition of a death sentence, is difficult and fraught with danger. This Court intended to severely restrict any evidence of criminal activity, in order to avoid prejudice and confusion of the issues. Lambert committed a horrible crime. That crime, and others he committed, should not have been the focus of the mental retardation proceedings. The prosecution's use of this evidence shifted the focus away from Lambert's mental capabilities and to his criminal actions. The record

shows that this improper and inflammatory evidence influenced the jury's verdict, which cannot be otherwise explained. As we concluded above, a rational trier of fact – that is, one not improperly influenced by prejudicial and inflammatory evidence – could not have found that Lambert did not meet his burden to prove mental retardation by a preponderance of the evidence. The trial court's finding of fact that the jury was not improperly influenced by this evidence is not supported by the record, clearly erroneous, and an abuse of discretion.[39]

¶31 In Proposition XI Lambert complains of irrelevant, inadmissible and prejudicial evidence relating to psychiatric and medical issues other than mental retardation. Lambert attempted to introduce portions of institutional records or transcripts of prior testimony bearing on the question of mental retardation. Over objection, prosecutors were allowed to use those records and transcripts in their entirety, and introduce other witnesses, to testify about personality tests Lambert had taken and psychiatric diagnoses other than mental retardation. At one point Lambert was diagnosed with a "conduct disorder". A later record states he had "dysocial disorder", which the prosecutor described in argument as a precursor to "antisocial disorder" or "sociopath". There were suggestions that Lambert might have other psychological problems such as schizophrenia. Mental retardation and mental illness are separate issues. It is possible to be mentally retarded and mentally ill. Lambert has not claimed to be mentally ill, and evidence of mental problems did not make the issue of his mental retardation more or less likely. Prosecutors

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[39] *Murphy v. State*, 2003 OK CR 6, 66 P.3d 456, 458; *Young* 12 P.3d at 48.

used this information to argue that Lambert's adaptive functioning limitations were caused by something other than mental retardation. However, in doing so, they accepted Lambert's claims of adaptive functioning limitations. As we discuss above, when the State failed to negate those claims Lambert's burden of proof was met. This evidence, offered as an alternative to explain Lambert's limitations, was irrelevant. Its only possible relevance could have been if prosecutors used evidence of mental problems to argue that Lambert had no limitations in adaptive functioning. The record suggests this was an argument prosecutors could not make. Evidence of mental problems and other psychological testing should not have been admitted.

¶32 In Proposition XVIII Lambert correctly argues that the accumulation of error throughout these proceedings requires relief. We have discussed serious errors raised in Propositions I, II, III, V, VIII, X, XI and XV. Lambert raises several other claims, but the cumulative effect of the eight we have discussed requires relief. We therefore do not address the merits of his remaining propositions of error.

¶33 This case is, fortunately, an anomaly in our system. Lambert has raised the issue of mental retardation since 1994. Since then, the State has had ample opportunity to contest Lambert's claim that he is mentally retarded. Before 2002, the State chose not to do so. Instead, the State accepted his claim and argued that Lambert's mental retardation was a factor in aggravation supporting a death sentence. Only after *Atkins*, when a mentally retarded defendant can no longer face execution, has the State chosen to contest this issue. In doing so, the State attempted to discredit 21 years of IQ testing, including

the test given by its own expert, all of which found Lambert was mildly mentally retarded. The State largely failed to address Lambert's claims of deficits in adaptive functioning in specific areas over the years. Instead, the State relied almost exclusively on evidence of Lambert's past criminal activity, arguing that he was not mentally retarded but had chosen a life of crime. These choices do not suggest an attempt to comply with either the spirit or letter of the law prohibiting the execution of the mentally retarded. Given the totality of the circumstances of this case, we now enforce that law.

DECISION

¶34 Lambert's two death sentences are hereby **MODIFIED** to two life without the possibility of parole sentences. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

OPINION BY: CHAPEL, P. J.
LUMPKIN, V.P.J.: DISSENT
C. JOHNSON J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN PART/DISSENT IN PART

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING.

¶1 I strongly dissent to the Court's alarming decision to vacate Petitioner's death sentence and then modify his sentence to life imprisonment without parole. The Court has no business replacing a validly reached and legally supportable jury decision with its own personal point-of-view.

¶2 In *Myers v. State*, 2005 OK CR 22, ¶ 7, ___ P.3d ___, this Court set forth the standard of review we will use on appeal when a defendant challenges the sufficiency of the evidence following a jury finding that he or she is not mentally retarded. But now, in one of the first post-*Myers* cases, the Court has already grossly misapplied that standard to the extent it can be argued *Myers* has been overruled by implication. To apply a certain standard of review means more than using the right terminology. Here the Court actually applies *de novo* review in a crusade to impose its will over that of the finder of fact.

¶3 By stating that no rational trier of fact could have found Petitioner failed to meet his burden by a preponderance of the evidence, the Court ignores one important fact. Twelve rational jurors reviewed the evidence in this case and did in fact reach that conclusion. Unless we can say no rational juror could have possibly reached that decision upon viewing the evidence in a light most favorable to the State, we have a legal duty to affirm.

¶4 The Court's opinion can be reached in only two ways, and neither is legitimate. The first is if we substitute our view of the evidence for the jury's. But this course is against our well-established case law that the jury is the exclusive judge of the weight and credibility of the evidence. *See Smith v. State*, 1996 OK CR 50, ¶23, 932 P.2d 521, 530; *Robedeaux v. State*, 1993 OK CR 57, ¶43, 866 P.2d 417, 429. It is also contrary to the very purpose of this Court. As set out in Article 7, §4, of the Oklahoma Constitution, "the

Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases".[1]

¶5 The second manner in which the Court could reach its decision is if the trier of fact is found to be irrational. But the Court does not go there, for obvious reasons. Instead, the opinion *seems* to find the jury's verdict is not worthy of credence because (1) the jury panel was tainted therefore Petitioner was not tried by an impartial jury and (2) because inadmissible evidence was heard and used in arriving at the verdict.[2]

¶6 As for the first point, the opinion finds the jury panel was tainted on the first day of *voir dire* by a comment from a prospective juror concerning facts of the crime for which Petitioner now sits on death row. The United States Supreme Court and this Court have long held that an accused is not entitled to a juror who knows nothing about his case. *See Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). *See also DeRosa v. State*, 2004 OK CR 19, ¶17, 89 P.3d 1124, 1134; *Braun v. State*, 1995 OK CR 42, 909 P.2d 783, 792; *McBrain v. State*, 1988 OK CR 261, ¶16, 764 P.2d 905, 909.

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[1] Appellate jurisdiction is that power and jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law. *Carder v. Court of Criminal Appeals*, 1978 OK 130, ¶12, 595 P.2d 416, 419; *State v. Cole*, 4 Okl.Cr. 25, 109 P. 736 (1910). It is not a license to become super-jurors. Under our legal system, juries, not judges, decide the facts. A cold appellate record is a poor substitute for a live courtroom.

[2] Of course, the proper remedy, assuming either of these points has merit, is to send the matter back for a new trial. And it is quite telling that the Court doesn't choose that option. It's as if the opinion is saying an Oklahoma jury simply cannot be trusted to make the "right decision."

Rather, when evaluating whether a juror is sufficiently impartial to be allowed to serve, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *DeRosa*, 2004 OK CR 19, ¶17, 89 P.3d at 1134, *quoting Irvin v. Dowd*, 366 U.S. at 722, 81 S.Ct. at 1642.

¶7 In the present case, the jurors said they could set aside any knowledge of the facts of the case they may have had and would decide the issue of mental retardation based solely upon the evidence presented at trial. This is all courts can ask of a juror. A review of the record shows the jury panel was not tainted.

¶8 Secondly, the rules of evidence were properly applied in this case. The trial judge carefully considered the probative value of evidence offered for admission versus its prejudicial impact. Both the defense and the State made objections repeatedly, and the record reflects numerous discussions on why particular evidence was or was not admissible. The record reflects that only evidence relevant to the issue of mental retardation was admitted.

¶9 Looking to that evidence and applying the *Murphy* standards, Petitioner made the threshold showing of a full scale IQ test score under 70. Then, concerning the first *Murphy* prong, the evidence was sharply conflicting concerning his ability to understand and process information, communicate, learn from experiences, engage in logical reasoning, control impulses, and understand the reactions of others. Thus, when viewed in a light most favorable to the State, there was more than enough evidence for jurors to reach the conclusion they did.

¶10 Appellant had several IQ tests that placed him near the top of the mildly mentally retarded range. However,

the State's expert challenged the validity of some of the tests and there was evidence of malingering from several credible sources. Petitioner's former teachers testified he was held back in school and placed in educable mentally handicapped classes, but the State's evidence showed his poor school performance could be attributed to parental neglect. One teacher testified Petitioner was a behavior problem. She had wanted to put him in a special education class, but Petitioner tested two points above the cutoff for that class. He dropped out of school after the 7th grade, but this was because he was suspended for hitting a teacher.

¶11 Petitioner's former cellmates testified he had trouble reading, writing, and communicating orally. But the State presented examples of Petitioner's writing and testimony from three Department of Corrections employees (two of whom worked with mentally retarded inmates) who had significant contact with him.[3] The employees testified Petitioner was able to converse like any other inmate, recreate, make purchases, read, write, sign his name, and keep clean. They did not think of him as mentally retarded. Indeed, he scored high enough to be recommended for Vo Tech and completion of his GED. The State also presented significant evidence of Petitioner's communications with police, which showed he could communicate effectively and remember events and details of his crimes.

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[3] The opinion criticizes several State's witnesses because they did not testify to long or complex conversations with Petitioner, but it is questionable whether any of Petitioner's former cellmates ever had such conversations with him either.

¶12 As for the 3rd *Murphy* prong,[4] adaptive functioning,[5] the State was hard-pressed to rebut Appellant's claims that he could not maintain a job and has never lived independently, for Appellant has been incarcerated for 21 of his 38 years of life (a fact defense counsel disclosed to jurors during opening statements). Thus, the State had to rely on Appellant's criminal history.[6]

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[4] As for the second *Murphy* requirement, the parties agreed that whatever Petitioner's condition was it had manifested itself before he turned eighteen.

[5] Neither this opinion nor our prior cases address whether the defense must give pre-trial notice regarding the adaptive skill limitations they seek to prove. While all parties are granted the right of discovery in these proceedings, if the Court is going to require the State to specifically rebut the defendant's evidence, then the State should have notice before trial of the defense evidence they must be prepared to answer. Here, during opening statements, defense counsel identified one of the specifically listed skills, self-care, and made other comments suggesting the adaptive skills of work, home living, and social/interpersonal skills. Assuming the defense adequately identified the adaptive skills it would try to prove, this case highlights how the Court's requirement that the State present only evidence to rebut the defendant's claims of adaptive functioning limitations, and no other evidence, results in an uneven playing field. Restricting the State's presentation of evidence in this manner is an improper attempt by this Court to tell the attorneys how to try their case.

More importantly this Court can always take judicial notice of the fact a defendant is not going to put on evidence in an area where the State has the strongest evidence to rebut. It is for this reason that the State should be allowed to present all relevant evidence regarding a defendant's adaptive skills and not allow a defendant to deny the trier of fact of relevant evidence by parsing the method of presentation. In addition, by predetermining what evidence the State can present, this Court is exhibiting a definite bias against the State and its case.

[6] Evidence of a defendant's prior criminal history should be admissible when it is relevant to mental retardation. In this case, the court was careful to admit only testimony concerning Petitioner's actions in specific criminal contexts. The jury did not hear any reference to the

(Continued on following page)

¶13 Whether or not prior crimes required abstract thought or complex planning relevant to the issue of mental retardation depends on the facts of that particular crime, not the type of crime committed. In Appellant's case, evidence of his prior crimes showed he did not have significant limitations in social/interpersonal skills – he was a leader and not a follower, as the experts said most mentally retarded people are. He communicated well. That is, he made himself understood to his cohorts and victims and he understood what his victims and the authorities said to him. Plus, he did not have significant limitations in self-direction, as he was able to evade authorities for weeks.

¶14 The crucial point is this: the evidence was conflicting on the first and third *Murphy* prongs. As such, the jury's decision must stand. This Court has no business substituting what "we would do" for what twelve competent jurors did. As we said in *Martinez v. State*, 1999 OK CR 33, ¶36, 984 P.2d 813, 824:

> . . . a fundamental premise of our criminal trial system is that "the jury is the lie detector." Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."

984 P.2d at 824 (internal citations omitted).

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type of crime committed or any reference to any punishment Petitioner may have received.

¶15 According to *Myers*, "We will not disturb the jury verdict where there is any competent evidence reasonably tending to support it." 2005 OK CR 22, ¶7, ___ P.3d ___. If only that were true. However, rather than following the now established law, the Court disregards that law and the analysis it requires to reach a desired result. In doing so it seeks to tie the hands of the State of Oklahoma as to how it is able to present relevant evidence in all future cases of this type. I regret the Court has elected to overstep its bounds on so many fronts in this particular case. I had always believed the law and relevant evidence would dictate a decision. That has not proven true in this matter and because of that fact, I must dissent.

LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:

¶1 I concur in reversing the verdict in this case. However, I dissent to modifying the sentence. I would reverse and remand for a new trial on the issue of mental retardation.

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No.: CF 1987-240
ROBERT WAYNE LAMBERT,	)	
Defendant.	)	

REPORT AND ORDER

FINDINGS 0F FACT AND CONCLUSIONS OF LAW

(Filed Jun. 21, 2004)

NOW on this 21st day of June, 2004, this cause comes on before me on the defendant's Application for Review by Trial Judge of Jury Verdict and for the Court to enter its Findings of Fact and Conclusions of Law pursuant to *Salazar v. State,* 84 P.3d 764 (Okl.Cr 2004) and *Martinez v. State,* 80 P.3d 142 (Okl.Cr. 2003). The State has appeared throughout this proceeding by District Attorney, Max Cook, and Assistant District Attorney, Carol Iski. The defendant is represented by Wyndi Thomas Hobbs and Vicki Ruth Adams Werneke.

The Court finds that a jury was empanelled herein on May 3rd, 2004 pursuant to the Order of the Court of Criminal Appeals in *Lambert v. State,* 2003 OK CR 11, 71 P.3d 30. The jury heard evidence in order to make a determination on defendant's claim of mental retardation, pursuant to *Murphy v. State,* 54 P.3d 556 (Okl.Cr. 2002).

To accomplish same, the Court utilized the procedure set forth in *Lambert v. State, supra.*

The Court further finds that the jury returned its verdict on May 21st, 2004 and after approximately four hours of deliberation, found the defendant "Not Mentally Retarded".

The Court further finds that the defendant did not raise sufficient evidence at the jury trial on the issue of mental retardation to prove that defendant is mentally retarded by a preponderance of the evidence as required by *Lambert, supra.*

The Court, after careful review of the testimony and evidence adduced at the jury trial on the issue of mental retardation, finds the following Findings of Fact and Conclusions of Law should issue, to-wit:

Findings of Fact, Conclusions of Law

1. The defendant began school in the fall of 1971, and was placed in Educable Mentally Handicapped (EMH) classes in approximately the fourth grade. The only school records still available were the defendant's transcript, which indicated failing grades throughout his school history, even after placement in EMH classes. The records also indicate significant amounts of absences throughout his school years.

2. Testimony was presented by Jean Peterson, a school counselor, that the IQ range for children to be placed in EMH classes during this time period was from 50 to 75 or 80. This IQ range was corroborated by the testimony of Patricia Coonfield, defendant's 7th

grade EMH teacher. The previous testimony of Carol Cutsinger, defendant's kindergarten and 1st grade teacher, was reviewed by defendant's expert, Dr. Denis Keyes, which indicated defendant was tested and scored two points above the cut-off for EMH classes, i.e., at 77.

3. In addition to excessive absences, testimony was presented that defendant frequently came to school sleepy, hungry, dirty and unprepared to adequately participate in the school routine. This testimony is of significance, as Dr. Steve Grissom testified IQ testing measures one's general fund of knowledge. The ability to obtain a general fund of knowledge will be severely limited by inadequate attendance, sleep and nutrition.

4. At age sixteen, defendant was arrested and placed in the Tulsa County Jail, and fabricated a story that he had swallowed a toxic cleaning solution. He was apparently transferred to the L.E. Racer Diagnostic and Evaluation Center in Sand Springs. A battery of psychological testing was administered, and on his IQ testing, defendant scored a 64 Verbal IQ, a 74 Performance IQ, and a Full Scale IQ of 68. No standardized adaptive functioning tests were administered, although such tests existed and were available in 1983. Dr. Steve Grissom, Chief Psychologist for the Rader Center for many years, testified that IQ testing alone, without standardized adaptive skills testing, is insufficient to diagnose an individual as mentally retarded. Experts for both sides agreed with this statement. Defendant was

also diagnosed with Conduct Disorder, which is indicative of an individual who refuses to follow rules, is often engaged in criminal activity, and disregards the rights or feelings of others.

5. The Tulsa Public Schools' testing, which was unavailable and referenced by Dr. Keyes' review of prior hearing transcripts, and the L.E. Rader scores are the only tests administered prior to defendant's 18th birthday.

6. Defendant was later tested on five other occasions, and scored from 58 to 69, with the 69 full scale score from Dr. Keyes. Dr. Keyes, as well as Dr. John Call, the State's expert, both testified the standard error of measurement is approximately five points, and Dr. Keyes stated defendant's IQ falls somewhere between the ranges of 64 to 74 with a 95% accuracy rate.

7. Dr. Keyes testified he administered the Vineland Adaptive Skills Test to defendant to obtain a standardized measure of his adaptive functioning. No testimony was presented regarding the specific results of this testing, other than to say defendant was deficit in all areas. The questions on the Vineland concentrate on certain areas of functioning, and the answers range from "always does", "usually does", down to "never does". These answers are then added and scored. For the results of this specific test to be considered reliable, the individual reporting to the tester, (the historian) must be someone with intimate knowledge of the subject's past and present abilities. The results are considered unreliable if the

historian's contact is limited or the time frame in which contact was significant is too remote.

8. Dr. Keyes chose Sharon Hanson as the historian for the Vineland. Ms. Hanson is the defendant's half-sister. She testified that she was twelve years defendant's senior, and had moved from their home to Indiana when defendant was a very young child of approximately four or five. When she returned to Oklahoma, she was approximately eighteen years old, married, and moved into a home of her own never returning to the family home except for visits. On cross-examination, she repeatedly indicated her contact with defendant as a child was limited due to her being out of the home. She admitted she has only visited the defendant once or twice in the sixteen years he has been in prison for his current crimes.

9. The Court finds that Sharon Hanson's testimony was vague and her memory clouded by the passage of time. Her contact with defendant on an intimate basis was when both he and she were very young. She cannot be considered a reliable historian for the purposes of the Vineland testing. Dr. Call did not perform any adaptive skills testing testifying that defendant had been in prison for too many years, and anyone trying to remember his functioning level that long ago would be risky, leading to unreliable results. Other than Dr. Keyes, no other adaptive skills testing has been attempted.

10. The Court finds there was almost no reliable testimony regarding defendant's adaptive

functioning insofar as he has been incarcerated for all but approximately one year since his eighteenth birthday. While many family members testified about defendant's inability to function at an age appropriate level, such deficits may likely be explained by the impoverished environment in which defendant was raised (alcoholic parents who engaged in domestic violence, poverty, insufficient nurturing).

11. The clear impression left by the testimony regarding defendant's intelligence level is that he scores very low on verbal tasks, but scores well above the 70's level in his performance tests, which indicates he indeed functions poorly at language skills but is quite able to master everyday performance skills. While in the Department of Corrections at age eighteen, he was screened for vocational skills and was recommended to complete his GED and suited to pursue welding or work in the automotive fields.

12. While he testing in the verbal portion of the testing has historically proven to be significantly limited, he has proven to be able to communicate effectively his thoughts and desires. While it was disputed the degree of help he had from others, DOC records reflect numerous writings ranging from medical requests, dental requests, canteen requests with correct addition of the amounts to be purchased, requests for appeals of administrative decisions, waiver of his rights for further hearings, etc. Also admitted into evidence were two letters written by defendant indicating his desire to stop the appeals process and requesting assistance in

helping him do so. One was written to a DOC official, and the second to Robert Whittaker, Assistant Attorney General. The letters and the numerous written requests were courteous, clear, concise and articulate. All these factors support a reasonable conclusion that defendant possesses a higher intellectual and adaptive functioning level than he alleged.

13. Testimony from the State's witnesses indicates defendant had no significant work history after his release from the L.E. Rader Center. Instead, he engaged in numerous criminal activities which required higher levels of intellectual functioning. After his release from prison in 1986, defendant and another individual drove to Wichita, Kansas and committed crimes against two women. They eluded arrest for these crimes for several months, and would have gone undetected but for their apprehension for the crimes for which he is currently incarcerated. Both victims testified that it was the defendant that was the dominant person in the pair, barking out orders to both the victim as well as his partner. With one woman, he took precautions to avoid leaving behind evidence which might tie him to the crime. One of the women testified she had experience working with mentally retarded individuals, and both testified they had no indication that defendant was mentally retarded.

14. Additional testimony was received that defendant and his partner had planned a home invasion, picking out a house they believed to be a drug house as they noticed large

amounts of traffic to and from. They broke into the home, robbing the occupants, and then took the female with them to a location in rural Creek County, which was a location near where defendant had lived for only two weeks as a teenage some seven years before.

15. An audio tape was admitted wherein defendant admitted his involvement in the home invasion to Detective Fred Park. Defendant was able to clearly and effectively communicate with Detective Park, answer all his questions in a spontaneous, appropriate fashion, and at no time seemed confused or unable to understand what was being asked of him. He was able to remember events, landmarks, details of the crime, the time of day, the amounts of money taken, distinguish between types of weapons, i.e., a revolver versus an automatic pistol, and a claw hammer versus a ball peen hammer. A video tape was admitted wherein defendant was being questioned by Detective Bruce Duncan. The tape illuminated defendant's ability to communicate effectively, as well as his ability to plan, work in concert with a partner and effectuate his plan, counts out and divide the money from their crimes. Further, he was able to detail his activities for the past several days, which included driving back to Wichita, Kansas, navigate his way around in a city where he didn't reside, know and recall street names, and check into a motel. He also described eluding a massive manhunt, which included officers from multiple jurisdictions, as well as helicopters and police dogs. Also significant along these lines was an exhibit offered by

the State which was a motel receipt wherein defendant had checked into the motel in Wichita, Kansas, using a false name, which indicated his awareness of police efforts to apprehend him, Such testimony clearly reveals defendant's cunning nature and underlying intellectual abilities.

16. Significant testimony was received regarding defendant's malingering. As stated previously, defendant fabricated a story about drinking a toxic cleaner to get out of the Tulsa County Jail. In the testimony of Dr. Thomas Goodman, numerous referenced [sic] were made regarding defendant's claimed illnesses while in jail. Notations in the jail records regarding him "playing games" with the jail staff were made. The Eastern State records reflect he claimed to be hearing "voices", but these auditory hallucinations "were of questionable quality" according to hospital staff. He made numerous superficial suicide gestures, which initially resulted in better housing conditions or additional medications for defendant. Dr. Call performed malingering tests on defendant and concluded he was failing to put forth his best efforts, often scoring lower than chance. As a result, Dr. Call found his IQ score of 66 to be unreliable.

17. Most persuasive, however, was the testimony of DOC employees. Sherry McClendon was a dental hygienist and worked with defendant when he had his teeth pulled and dentures made. She estimated seeing him for approximately fifteen appointments. She testified she was able to communicate with him and explain to him the care needed for

his dental work. She testified she had no indicated [sic] he was unable to understand, or that he was mentally retarded. Emma Watts is a unit manager on defendant's unit, and has known him since approximately 1988. Her contact has varied from daily to weekly since that time. She testified he knew and understood the rules of their unit, and was able to comply and function appropriately. She testified that based on her extensive contact with defendant, she did not believe him to be mentally retarded.

18. Jane Rayburn worked as a recreational director on the defendant's unit for five years, and saw defendant every other week during that time frame. Part of her duties included selling craft items to the inmates. In order for them to order these items, they had to fill out a request, and once the order was filled, Ms. Rayburn would take the items to the inmate and have them check off all items to make sure he had been properly charged, and then sign off on the order. Defendant was able to complete this task each and every time with no assistance from her or a cellmate. She testified that they played games which included Bingo, Yatzee, dominoes and cards, and again, defendant was able to participate unassisted. She testified defendant was able to function well on the unit, make decisions, and get along well with the others. She never observed him being picked on because he was slow, as some of the more limited inmates were. She described his demeanor as cocky and arrogant. When asked her reaction when she learned defendant had raised the issue of mental

retardation, she testified she "was shocked". At no time did he appear so to her.

19. Defendant's ability to understand and manipulate his environment was most aptly described by newspaper reporters, Bob Sherrill and P.J. Lassek. Both reporters covered the numerous hearings held in defendant's case over the years. In separate articles, both reporters described the games defendant played in the presence of the jury. When in session, defendant would hang his head, sometimes laying it on the table and sit in a fixed, unanimated position staring straight ahead. However, when the jury was excused from the room, he would talk and smile with his attorneys and relatives in the courtroom. Mr. Sherrill testified that he attempted to photograph defendant to catch him while the jury was out, and when a camera was pointed at him, he resumed his emotionless fixed stare. Sherrill testified that defendant's cunning in spotting the cameras was evident and became a game with photographers.

20. Defendant did not take the stand in this proceeding. However, while in the Creek County Jail during the course of the trial, he made phone calls to his sister Jeanette which were recorded and admitted into evidence. In these calls, his sister attempts to discuss issues in the trial, and defendant cautions her not to as the calls might be recorded. When she persists, he skillfully changes the subject. He directs her to make certain phone calls to enable his cellmate to be transferred to another county. His conversations are clear, spontaneous and

thoughtful, and appropriate. Defendant made statements to his transport deputy, claiming he purchased "girlie" magazines through the mail, and then tore out pictures selling them for a significant profit.

21. The Court finds that defendant is not mentally retarded, pursuant to the *Murphy* definition, and that defendant wholly failed to meet his burden of proof in this regard. Specifically, defendant did not adequately prove that he functioned at a significantly subaverage intellectual level that substantially limited his ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control his impulses and to understand the reaction of others. Further, defendant failed to show that such low intellectual functioning manifested itself prior to the age of eighteen or that he suffered from limitations in his adaptive skills as a result of his claimed intellectual impairment.

22. The claim by defendant in his Application for Review by Trial Judge of Jury Verdict that the jury was improperly influenced by the introduction of evidence relating to the crimes for which he was convicted and other crimes is without merit. Defendant spent very little time outside of an institution. What time he did have, he chose to support himself by committing criminal acts, at which he proved to be quite adept. As enumerated above such evidence proved defendant's ability to function, while admittedly in a criminal fashion, but nevertheless, the ability to function. Accordingly defendant is

not entitled to relief on this purported assignment of error.

23. The claim by defendant in his Application for Review by Trial Judge of Jury Verdict that the jury was improperly influenced by the news reports from the media is wholly conjecture and unsupported by any evidence whatsoever. The jury was properly instructed to ignore newspaper or other accounts of the trial and that no instances of juror misconduct have been reported to or observed by the Court. Accordingly defendant is not entitled to relief on this purported assignment of error.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant, ROBERT WAYNE LAMBERT, did not meet his burden of proof at the jury trial on the issue of mental retardation in accordance with the definition set forth in *Murphy,* and accordingly defendant is not mentally retarded.

IT IS FURTHER ORDERED by the Court that all further proceedings shall be pursuant to the Order of the Court of Criminal Appeals and the relief sought in defendant's Application for Review by Trial Judge of Jury Verdict is hereby denied.

IT IS SO ORDERED.

/s/ Donald D. Thompson
DONALD D. THOMPSON
JUDGE OF THE DISTRICT COURT